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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

THE KLAMATH TRIBE,

Petitioner,

v.

STATE OF OREGON, DEPARTMENT OF WATER RESOURCES, and MARTHA PAGEL, ITS DIRECTOR,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the McCarran Amendment's (43 U.S.C. § 666) waiver of the United States' sovereign immunity from suit, on the condition that the state-law water rights adjudication be comprehensive and effective, triggered where the state proceeding excludes hydrologically connected ground water, the pumping of which has been shown to dewater or deplete surface streams?

2. Is the McCarran Amendment's waiver of sovereign immunity, on condition that the state proceeding be a "suit" in "court," triggered where Oregon's procedures provide for a hearing before the state water agency, without judicial supervision, followed by mandatory, but limited, judicial review?

3. Is the Klamath Tribe's Due Process right to an unbiased decision maker violated where the Tribe's water rights will be adjudicated by the same state agency that, in earlier litigation, strenuously argued against the very existence of Klamath tribal water rights in its capacity as an opposing party?

LIST OF PARTIES

The parties to this case are the United States, The Klamath Tribe (a federally recognized Indian tribe), the State of Oregon, and the Klamath Allottees Water Users Association.

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

A. The Nature of the Case 3

B. Federal Statutory Issues 4

1. McCarran Amendment – Comprehensiveness 4

2. McCarran Amendment – Forum 6

C. Federal Constitutional Due Process Issue ... 6

D. Proceedings Below 7

REASONS FOR GRANTING THE WRIT 10

1. THE RULING BELOW DEPARTS FROM ESTABLISHED SOVEREIGN IMMUNITY PRECEDENTS OF THIS COURT REGARDING THE IMPORTANT "COMPREHENSIVENESS" REQUIREMENT OF THE MCCARRAN AMENDMENT; THE RESULT WILL BE AN INEFFECTIVE DECREE THAT DOES NOT PROTECT ADJUDICATED WATER RIGHTS FROM COMPLETE DEFEASANCE 10

A. The interrelationship between ground water use and surface water rights is an immutable fact recognized both scientifically and judicially 11

B. Because ground water is excluded, Oregon's water rights proceedings cannot protect adjudicated surface water rights from depletion by unadjudicated ground water rights and further piecemeal litigation will be required to achieve an effective decree 12

TABLE OF CONTENTS – Continued

Page

C. The ruling below specifically conflicts with principles in this Court's uniform precedents counselling against piecemeal litigation of water rights; the departure has important consequences and should be reviewed by this Court 14

2. THE RULING BELOW MISAPPLIES THIS COURT'S ESTABLISHED PRECEDENTS REQUIRING STRICT CONSTRUCTION OF WAIVERS OF FEDERAL SOVEREIGN IMMUNITY FROM SUIT 18

A. The court of appeals departed from the established rule that waivers of immunity be narrowly construed 18

B. There are sound reasons for applying, in the instant water rights case, the established rules of construction for waivers of federal sovereign immunity from suit 20

3. THIS CASE PRESENTS UNRESOLVED DUE PROCESS QUESTIONS ABOUT THE COMBINATION OF ADVOCACY AND ADJUDICATORY ROLES WITHIN THE SAME ADMINISTRATIVE AGENCY; DECISIONS OF THE FEDERAL COURTS CONFLICT ON THE POINT 22

A. The state has vehemently advocated against the existence of the tribal water rights it now seeks, as adjudicator, to quantify 22

B. This Court should review the acceptability, for due process purposes, of the state agencies' shift in role from advocate to adjudicator in the same proceeding 24

CONCLUSION 26

TABLE OF AUTHORITIES

Page

CASES

Ardestani v. INS, 112 S.Ct. 515 (1991) 18

Arizona v. San Carlos Apache Tribe, 463 U.S. 545 (1983) 4, 10, 14, 17, 22, 25

Association of National Advertisers, Inc. v. FTC, 460 F.Supp. 996 (D.D.C. 1978), rev'd on other grounds, 627 F.2d 1151 (D.C. Cir. 1979), cert. denied, 447 U.S. 921 (1980) 25

Cappaert v. United States, 426 U.S. 128 (1976) 4, 11

Dugan v. Rank, 372 U.S. 609 (1963) 4, 10, 14

In re Gila River System and Source, 175 Ariz. 382, 857 P.2d 1236 (Ariz. 1993) 11

In re Snake River Basin Water System, 115 Idaho 1, 764 P.2d 78 (Idaho 1988), cert. denied, 490 U.S. 1005 (1989) 11, 15, 16

Irwin v. Department of Veterans Affairs, 498 U.S. 89 (1990) 18

Kansas v. Colorado and United States, 115 S.Ct. 1733 (1995) 5, 12

Kimball v. Callahan ("Kimball I"), 493 F.2d 564 (9th Cir. 1974), cert. denied, 419 U.S. 1019 (1974) 22

Kimball v. Callahan ("Kimball II"), 590 F.2d 768 (9th Cir. 1979), cert. denied, 444 U.S. 526 (1979) 22

Nebraska v. Wyoming and Colorado, 115 S.Ct. 1933 (1995) 5, 12

Putah Creek Council v. Solano Irrigation District, Calif. Superior Ct. Coordination Proceeding No. 2565 (1992) (Appendix D hereto, App. 82) 11, 15, 16

Richardson v. Perales, 402 U.S. 389 (1971) 24

Ruckleshaus v. Sierra Club, 463 U.S. 680 (1983) 18

TABLE OF AUTHORITIES – Continued

Page

State ex rel. Martinez v. Lewis, 116 N.M. 194, 861 P.2d 235 (N.M. App. 1993), cert. denied, 858 P.2d 85 (N.M. 1993) 11

Trans World Airlines v. CAB, 254 F.2d 90 (D.C. Cir. 1958) 24

Tulee v. Washington, 315 U.S. 681 (1952) 9

United States Department of Energy v. Ohio, 112 S.Ct. 1627 (1992) 18

United States v. Adair, 478 F.Supp. 336 (D. Or. 1979), aff'd, 723 F.2d 1394 (9th Cir. 1984), cert. denied, 467 U.S. 1252 (1984) 6, 7, 23

United States v. Bluewater-Toltec Irrigation District, 580 F.Supp. 1434 (D. N.M. 1984), aff'd, 806 F.2d 986 (10th Cir. 1986) 15

United States v. District Court for Eagle County, 401 U.S. 520 (1971) 15

United States v. District Court, Water Division No. 5, Colorado, 401 U.S. 527 (1971) 4, 10, 14, 15

United States v. Idaho, 113 S.Ct. 1893 (1993) 4, 8, 9, 10, 14, 18

United States v. Nordic Village, Inc., 112 S.Ct. 1011 (1992) 18, 19

United States v. State of Oregon, 44 F.3d 758 (9th Cir. 1994) (Appendix A hereto, App. 1) 8, 11

Walker v. City of Berkeley, 951 F.2d 182 (9th Cir. 1991) 25

Washington Department of Ecology v. Yakima Reservation Irrigation District, 121 Wash.2d 257, 850 P.2d 1306 (Wash. 1993) 11

Withrow v. Larkin, 421 U.S. 35 (1975) 24

TABLE OF AUTHORITIES – Continued

Page

UNITED STATES STATUTES

28 U.S.C. §1254(1) 2
28 U.S.C. §1331 7
28 U.S.C. §1345 7
28 U.S.C. §1362 7
43 U.S.C. §666 (the McCarran Amendment) ..... *passim*

OREGON STATE STATUTES AND REGULATIONS

ORS 180.060 ..... 3, 23
ORS 537.620(3) 3, 13
ORS 537.670 ..... 3, 13
ORS 537.735 ..... 3, 13
ORS 539.130(4) 3, 20
ORS 539.150 ..... 3, 23
OAR 690-09-050(1) 3, 13

OTHER AUTHORITIES

H.R. 7691, 82nd Cong. 2d Sess. (1952) 19

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner THE KLAMATH TRIBE respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on December 28, 1994.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit, entered December 28, 1994, is reported at 44 F.3d 758, and is reprinted at Appendix A hereto, pages App. 1 to App. 39.

The opinion of the District Court for the District of Oregon, Portland Division, is reported at 774 F.Supp. 1568, and is reprinted at Appendix B hereto, pages App. 40 to App. 70.

JURISDICTION

The judgment and opinion of the Court of Appeals for the Ninth Circuit were entered on December 28, 1994. A timely petition for rehearing and suggestion for rehearing *en banc* were filed by the Tribe on February 11, 1995, and by the United States on February 10, 1995. The petition for rehearing was denied, and the suggestion for rehearing *en banc* refused, on March 28, 1995.

On June 20, 1995, Justice O'Connor granted a timely application by the Tribe for an extension of time, to and

including July 25, 1995, within which to file a Petition for a Writ of Certiorari. This petition is filed on July 25, 1995, within the granted extension of time.

This Court has jurisdiction to review the judgment of the Court of Appeals for the Ninth Circuit under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution and the following federal and state statutes.

Federal statute

The McCarran Amendment, 43 U.S.C. § 666(a):

> (a) Joinder of the United States as defendant; costs.
>
> Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the state laws are inapplicable or that the United States is

> not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: Provided, That no judgment for costs shall be entered against the United States in such suit.

Oregon State Statutes and Administrative Rules

The relevant Oregon Revised Statutes (ORS) and Oregon Administrative Rules (OAR) are reproduced in full at Appendix C, pages App. 71-80.

Statutes:

ORS 180.060	ORS 537.620(3)
ORS 537.670	ORS 537.735
ORS 539.130(4)	ORS 539.150

Administrative rules:

OAR 690-09-050(1)

STATEMENT OF THE CASE

A. The Nature of the Case

The State of Oregon's Water Resources Department (OWRD) asserts jurisdiction to quantify federally reserved water rights of the United States and the Klamath Tribe in its Klamath River Basin Adjudication proceedings. The United States' sovereign immunity from suit would bar such jurisdiction, but OWRD asserts that the McCarran Amendment, 43 U.S.C. § 666, is a waiver of that immunity.

The United States brought suit in the district court to challenge the State's assertion of jurisdiction and its interpretation of the McCarran Amendment. The Klamath Tribe, a federally recognized Indian tribe, intervened. The Tribe adopted the United States' position on the McCarran Amendment issues and added a federal constitutional due process claim based on the state's interpretation of the McCarran Amendment.[1]

B. Federal Statutory Issues

1. McCarran Amendment – Comprehensiveness

This Court has held that the McCarran Amendment requires a *comprehensive* adjudication of water rights in order to effectively resolve competing water claims and to avoid piecemeal adjudications. *Dugan v. Rank*, 372 U.S. 609 (1963); *United States v. District Court, Water Division No. 5, Colorado*, 401 U.S. 527 (1971); *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983); *United States v. Idaho*, 113 S. Ct. 1893 (1993). The Court has also noted that ground water and surface water are integrally related elements of the hydrologic cycle. *Cappaert v. United States*, 426 U.S. 128, 142 (1976). Oregon adjudicates only surface water claims and does not include ground water claims.

This Court has recognized that ground water pumping in the American West commonly interferes with the

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[1] An organization of Indian landowners ("Allottees") also intervened, not to challenge state jurisdiction, but to assert immunity under federal law from OWRD filing fees.

exercise of surface water rights. See, e.g., *Kansas v. Colorado and United States*, 115 S.Ct. 1733 (1995) (acknowledging that resolving water conflicts requires addressing Kansas' claim that well pumping in Colorado materially depletes "stateline flows" into Kansas); *Nebraska v. Wyoming and Colorado*, 115 S.Ct. 1933 (1995) (acknowledging that resolving water conflicts requires addressing Nebraska's claim that well pumping in Wyoming depletes surface flows in Nebraska).

The record in this case shows that ground water pumping directly and substantially interferes with surface water flows in the adjudication area. In one primary system, the Sprague River system, ground water pumping causes the amount of down stream water in the River to decrease. And in a tributary stream ground water pumping so depletes surface flows that the stream actually *reverses its flow* and flows *back into the ground*.

Ground water users are not parties to Oregon's water proceedings; only surface water claims will be adjudicated. After the proceedings are finished, adjudicated rights of surface water users will not be protected from depletion by ground water use. In order to vindicate, vis-a-vis ground water users, the adjudicated surface water rights, voluminous further individualized or collective proceedings will be necessary.

As a matter of science and logic, and the uncontradicted record of this case, it appears that both ground water and surface water must be included in any adjudication that intends to effectively reconcile competing claims to water use. This case presents the question whether the comprehensiveness requirement of the

McCarran Amendment conditions the waiver of federal sovereign immunity on the inclusion of hydrologically connected ground water in general water rights adjudications where such inclusion is necessary to provide an effective decree that protects adjudicated surface water rights and avoids piecemeal proceedings.

2. McCarran Amendment – Forum

The McCarran Amendment waives federal sovereign immunity only for "suits" in state "courts." Oregon does not conduct general stream adjudications in state court. Rather, the proceedings are initiated by the Director of the OWRD (a political appointee of the Governor) and are conducted and decided in the first instance by that agency. Only after this administrative decision is made and enforcement begun is there review by the state court of general jurisdiction. The extent of the review – whether *de novo* or something less – is unclear under state law.

This case presents the question whether such a state proceeding, which is not a "suit" in "court", but is an administrative proceeding without judicial supervision, satisfies the McCarran Amendment and, thus, triggers the waiver of federal immunity.

C. Federal Constitutional Due Process Issue

In 1975 the United States filed suit in federal court to protect its right to sufficient water for the Klamath National Wildlife Refuge, located on the former Klamath Indian Reservation. *United States v. Adair*, 478 F.Supp. 336

(D. Or. 1979), *aff'd* 723 F.2d 1394 (9th Cir. 1984) *cert. denied* 467 U.S. 1252 (1984). The Tribe intervened in *Adair* to protect its right to water necessary to the exercise of its treaty-protected fishing, hunting, and gathering rights.

The state in *Adair* opposed vigorously the very existence of the tribal water rights. Ultimately the federal courts upheld the existence of the Tribe's water rights though the quantification of those rights was left for later proceedings.

The same state agencies that unsuccessfully opposed the existence of the water rights now seek authority to quantify them. This case presents the question whether this combination of advocacy and adjudicatory roles in the same agencies violates the Tribe's due process right to an unbiased decision maker.

D. Proceedings Below

Jurisdiction in the district court was based on 28 U.S.C. § 1345 because the action was initiated by the United States; 28 U.S.C. § 1331 because the action involves an issue of federal law arising under the Constitution, laws, and treaties of the United States; and 28 U.S.C. § 1362 because the intervenor is a federally recognized Indian tribe.

The district court ordered cross-motions for summary judgment. The United States raised five McCarran Amendment issues. On the two issues set out above for this Court's consideration (the comprehensiveness and forum issues) the district court ruled in favor of the state. On one of the other issues the district court ruled in favor

of the United States[2]. On the remaining two issues (not presented in this Petition) the district court ruled in favor of the state.[3]

The Tribe as plaintiff/intervenor adopted the United States' arguments on the McCarran Amendment issues and raised the constitutional due process issue set out above (on which the district court ruled in favor of the

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[2] The United States contested Oregon's assertion that the McCarran Amendment allowed it to require the United States to file "registration statements" covering all possible water rights claims statewide, including those in basins neither being adjudicated nor scheduled for adjudication. The district court held this requirement was beyond the McCarran Amendment's waiver of federal immunity and the court of appeals affirmed. *United States v. State of Oregon*, 44 F.3d 758, 770-71 (9th Cir. 1994) (App. 30-32).

[3] The United States contested Oregon's assertion that the McCarran Amendment allowed it to charge "filing fees" for the federal and certain tribal claims. The district court ruled in the state's favor, but on appeal the state abandoned this assertion after this Court's construction of the McCarran Amendment in *United States v. Idaho*, 113 S.Ct. 1893 (1993).

The final issue was whether State water rights holders with a post-1909 priority date must be made parties to the current adjudication. (In 1909 Oregon changed from a purely prior appropriation water doctrine to an application-and-permit system. The State contends that post-1909 permitted rights are already adjudicated and need not be included here for McCarran Amendment purposes.) This issue was resolved in the State's favor. The Tribe takes no position here regarding this Court's possible review of the issue.

state), and one other McCarran Amendment issue (on which the district court ruled in favor of the Tribe).[4]

All parties appealed. On appeal the court of appeals reversed the district court on the "filing fees" issue (see footnote 3) holding in light of this Court's ruling in *United States v. Idaho*, 113 S.Ct. 1893 (1993), that such fees were not encompassed by the McCarran Amendment's immunity waiver. On all other issues the court of appeals affirmed the district court, holding, on the issues presented here for review that: (1) the state's administrative processes, coupled with judicial review, is adequate to meet the "suit" in "court" requirement of the McCarran Amendment; (2) ground water need not be included in the state proceedings because the state will probably deal with it in some other (unspecified) way, and because Congress did not intend its inclusion; and (3) the Tribe did not prove a probability of actual state agency bias so great as to be unacceptable. Rehearing was denied and this Petition follows.

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[4] The Tribe challenged the State's assertion that the McCarran Amendment allowed it to charge the Tribe "filing fees" for tribal water rights claims not advanced by the United States. The district court ruled for the Tribe based on this Court's holding in *Tulee v. Washington*, 315 U.S. 681 (1942) (App. 68-70). The state did not appeal this ruling to the court of appeals.

REASONS FOR GRANTING THE WRIT

1. THE RULING BELOW DEPARTS FROM ESTABLISHED SOVEREIGN IMMUNITY PRECEDENTS OF THIS COURT REGARDING THE IMPORTANT "COMPREHENSIVENESS" REQUIREMENT OF THE MCCARRAN AMENDMENT; THE RESULT WILL BE AN INEFFECTIVE DECREE THAT DOES NOT PROTECT ADJUDICATED WATER RIGHTS FROM COMPLETE DEFEASANCE.

In an unbroken line of cases this Court has held that the McCarran Amendment (waiving federal sovereign immunity for certain state court water adjudications) requires the inclusion of all competing water rights claims so that adjudications are "comprehensive" and, therefore, effective. This requirement reflects both the underlying purpose of the McCarran Amendment (an effective decree requires inclusion of all competing water claims), and also "the general judicial bias against piecemeal litigation." *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 570 (1983); *Dugan v. Rank*, 372 U.S. 609 (1963); *United States v. District Court, Water Division No. 5, Colorado*, 401 U.S. 527 (1971); *United States v. Idaho*, 113 S.Ct. 1893 (1993).

The ruling below conflicts with these cases because it specifically applies the McCarran Amendment's immunity waiver to proceedings that will *not* lead to an effective decree and will require piecemeal litigation. The court below recognized these results, yet it elected not to apply this Court's precedents forbidding such outcomes.

And it grafted on an indeterminate and counterproductive modifier, prohibiting only "*excessively* piecemeal litigation." *United States v. State of Oregon*, 44 F.3d 758, 769 (9th Cir. 1994) (Appendix A hereto at App. 27.)

The case should be reviewed to determine whether this departure from precedent should stand. The issue has widespread implications, especially in the West, where general water rights adjudications are frequently employed to resolve controversies that affect the water rights of federal, state, and tribal governments, as well as innumerable individuals. *See, e.g., Washington Department of Ecology v. Yakima Reservation Irrigation District*, 121 Wash.2d 257, 850 P.2d 1306 (Wash. 1993); *In re Gila River System and Source*, 175 Ariz. 382, 857 P.2d. 1236 (Ariz. 1993); *State ex rel. Martinez v. Lewis*, 116 N.M. 194, 861 P.2d 235 (N.M. App. 1993), *cert. denied*, 858 P.2d 85 (N.M. 1993). Already the instant case calls into question the validity of other rulings in such proceedings. *E.g., In re Snake River Basin Water System*, 115 Idaho 1, 764 P.2d 78 (Idaho 1988), *cert. denied*, 490 U.S. 1005 (1989); *Putah Creek Council v. Solano Irrigation District*, Calif. Superior Ct. Coordination Proceeding No. 2565 (1992), Appendix D hereto, pages App. 81-88.

A. The interrelationship between ground water use and surface water rights is an immutable fact recognized both scientifically and judicially.

"Ground water and surface water are physically interrelated as integral parts of the hydrologic cycle." *Cappaert v. United States*, 426 U.S. 128, 142 (1976). This

Court has often recognized this immutable fact of nature. For example in *Kansas v. Colorado and United States,* 115 S.Ct 1733 (1995), the Court found that adjudication of competing rights to the Arkansas River system required consideration of the extent to which ground water pumping depletes surface water flows. And in *Nebraska v. Wyoming and Colorado,* 115 S.Ct. 1933 (1995), resolution of water conflicts likewise required analysis of the effect of ground water pumping on surface water flows.

This case compels a similar approach. In the Klamath Basin in Oregon ground and surface water are highly interdependent. Because of geologic and soil conditions, streamflow comes entirely from ground water during nearly half the year. At Whiskey Creek the State of Oregon itself has determined that ground water pumping so depletes the surface flow that the Creek reverses its flow and *flows from the surface back into the ground water aquifer by entering the spring holes that normally feed the Creek.*

The state proceedings are not adequate to deal effectively with this situation. The court of appeals improperly sanctioned this in derogation of this Court's established law.

B. Because ground water is excluded, Oregon's water rights proceedings cannot protect adjudicated surface water rights from depletion by unadjudicated ground water rights and further piecemeal litigation will be required to achieve an effective decree.

Ground water users are not required to participate in the Klamath Basin adjudication. They are not made

parties thereto, and the state has shown no way, either by law or policy, to bind them to the outcome of the surface water adjudication. Hence, streamflow depletions caused by ground water use will not be addressed at the outset. Only through subsequent, separate litigation will parties to the instant state proceedings be able to truly vindicate their surface water rights.[5]

Moreover, there may *never be* such vindication. Initiation of ground water proceedings is entirely discretionary with OWRD. ORS 537.620(3), 537.670. And the exercise of that discretion is to be guided by the agency's purely political considerations of "public welfare, health and safety". ORS 537.735. Even if the agency does address ground water problems, its rules require it to investigate each individual well "to determine the potential to cause substantial interference with a surface water source *on a case-by-case basis*." OAR 690-09-050(1) (emphasis added).

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[5] At the appellate level the state tried to change its position on this point. After admitting in its Answer that it would not adjudicate ground water claims, it suddenly announced that it would accept federal and tribal ground water claims. The appellate court appropriately ignored this late change of position.

Moreover, even if the state's new position is accepted, it does nothing to remedy the problem. The state has shown no authority by which nonparty ground water users are bound by decrees in the surface water proceedings. Accepting only tribal and federal ground water claims, as the state now proposes to do, does nothing to address this problem. In fact, it compounds the problem. Decreed surface water rights and decreed ground water rights will remain vulnerable to defeat by other ground water users who are still not parties.

This undeniably results in, at best, lengthy and costly resolution of water rights and, at worst, costly and ineffective non-resolution of those rights. Neither the state nor the court below contends otherwise. Rather, the court surmised that the state would somehow deal with ground water, or, alternatively, reasoned that Congress, in passing the McCarran Amendment, meant to allow such uncertainty and complexity. This reasoning conflicts with principles announced in this Court's precedents regarding the comprehensiveness required by the McCarran Amendment.

C. The ruling below specifically conflicts with principles in this Court's uniform precedents counselling against piecemeal litigation of water rights; the departure has important consequences and should be reviewed by this Court.

This Court has uniformly interpreted the McCarran Amendment to require avoidance of piecemeal adjudication of water rights. *Dugan v. Rank*, 372 U.S. 609 (1963) (suit against the United States by some but not all water claimants is not a "general" adjudication for McCarran Amendment purposes); *United States v. District Court, Water Division No. 5*, 401 U.S. 527 (1971) (Colorado's process is McCarranworthy because it reaches all water claims in the totality); *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983) (Indian water rights, although not mentioned in the Amendment, must be subjected to state court water proceedings in order to provide the comprehensiveness leading to an effective decree as desired by the McCarran Amendment); *United States v. Idaho*, 113

S.Ct. 1893 (1993) (the McCarran Amendment allows the United States to be joined in a comprehensive adjudication.).[6]

This requirement is based on explicit statements in the McCarran Amendment's legislative history recognizing that the inclusion of all interrelated water interests is essential to an effective decree. *United States v. District Court for Eagle County*, 401 U.S. 520 (1971).

The court below has undertaken to materially modify this legislative requirement. In place of the existing rule the court below has chosen a very amorphous standard based on its view that Congress *in*explicitly intended sometimes to approve state processes that fail to include all the water rights necessary to an effective decree. The

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[6] Lower courts have followed the Court's instruction on this point. *See, e.g., United States v. Bluewater-Toltec Irrigation District*, 580 F.Supp. 1434, 1438 (D. N.M. 1984), *aff'd*, 806 F.2d 986 (10th Cir. 1986) (The state's "all embracing" procedure is adequate for McCarran Amendment purposes, *citing Water Division No. 5, supra*); *In re Snake River Basin Water System*, 115 Idaho 1, 764 P.2d 78, 83-86 (Idaho 1988) *cert. denied* 490 U.S. 1005 (1989) (Tributaries of a mainstem river must be included when adjudicating the mainstem in order to achieve the comprehensiveness required by the McCarran Amendment, *citing Water Division No. 5, supra*).

Also following this Court's instruction requiring comprehensive, non-piecemeal, proceedings specific to the instant issue of ground water inclusion is *Putah Creek Council v. Solano Irrigation District*, Calif. Superior Ct. Coordination Proceeding No. 2565 (1992). The state trial court's reasoning regarding the need to include ground water in order to avoid piecemeal litigation is compelling, *citing Water District No. 5, supra*. The opinion is attached as Appendix D hereto and is discussed more fully *infra*.

court's new standard sacrifices a great deal of certainty and provides no articulated benefit. In fact, it provides particularly fertile ground for even more litigation:

> We conclude that while [a McCarranworthy] adjudication must avoid *excessively* piecemeal litigation of water rights, *it need not determine the rights of users of all hydrologically-related water sources.*

44 F.3d at 769 (emphasis added) (Appendix A hereto at App. 27).

What is "excessively" piecemeal litigation? No guidance is given. How can the exclusion of hydrologically related water result in an effective decree? There is no rationale.

Indeed, the ruling below already calls into question McCarran Amendment cases in which lower courts have relied on this Court's established precedents. For example *In re Snake River Basin Water System*, 115 Idaho 1, 764 P.2d 78 (Idaho 1988), *cert. denied*, 490 U.S. 1005 (1989), applied the Court's precedents to hold that McCarran Amendment comprehensiveness requires the inclusion of tributaries to the mainstem being adjudicated. Now perhaps the exclusion of tributaries would not be considered an "excessively" piecemeal result.

And in *Putah Creek Council v. Solano Irrigation District*, Appendix D hereto (App. 82-88), the court relied squarely on this Court's comprehensiveness requirement to hold that federal law requires the inclusion of ground water claims where necessary to avoid piecemeal litigation.

Again, the question now arises whether this case is correctly decided. Perhaps the piecemeal result avoided by the court there would not be deemed "excessive".

In these and other cases the courts are now left to guess what the McCarran Amendment really means, given this Court's precedents and the conflicting ruling by the court of appeals in the instant case.[7]

This case should be reviewed to reconcile this variance. Unified federal guidance in applying the McCarran Amendment is needed and should be provided by this Court.[8]

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[7] There is no justification for waiting until the state courts have grappled with the problem through several more cases. The issue is, after all, a matter of federal law as to which federal court interpretations will be dispositive. A prompt, final ruling is called for, all the more so because of the immense investments of time and money required by all parties to general water rights adjudications.

[8] The case should also be reviewed to ensure consistent application of the comprehensiveness requirement. In *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983), this Court held that the interdependence of Indian water rights and other water rights required inclusion of Indian rights in order to provide a comprehensive, effective decree. Now Oregon relies on the *San Carlos* reasoning to bring Indian water rights within its grasp but, for purely administrative reasons, it seeks to ignore the comprehensiveness reasoning where hydrologically connected ground water is concerned. Such selective application of this Court's precedents demonstrates the need for review.

2. THE RULING BELOW MISAPPLIES THIS COURT'S ESTABLISHED PRECEDENTS REQUIRING STRICT CONSTRUCTION OF WAIVERS OF FEDERAL SOVEREIGN IMMUNITY FROM SUIT.

A. The court of appeals departed from the established rule that waivers of immunity be narrowly construed.

By its plain language the McCarran Amendment waives federal immunity for a "suit" in state "court". In the instant case the state seeks to extend this language to include administrative proceedings before state agency officials. In permitting this extension the court below departed from established precedents of this Court. Review of that departure is necessary to provide clear and uniform federal court construction of statutes waiving immunity.

This Court has consistently made clear that a waiver of sovereign immunity must be apparent on the face of the statute.

> There is no doubt that waivers of federal sovereign immunity must be "unequivocally expressed" in the statutory text. *See Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95 * * * (1990); *United States Department of Energy v. Ohio*, 112 S.Ct. 1627 (1992); *United States v. Nordic Village, Inc.*, 112 S.Ct. 1011 (1992). "Any such waiver must be strictly construed in favor of the United States," *Ardestani v. INS*, 112 S.Ct. 515, 520 (1991), and not enlarged beyond what the language of the statute requires, *Ruckleshaus v. Sierra Club*, 463 U.S. 680, 685-86 * * * (1983).

United States v. Idaho, 113 S.Ct. 1893, 1896 (1993).

The court below acknowledged both this admonition and the fact that the McCarran Amendment's text contains no waiver to subject the United States to state administrative proceedings. But it then went on to look behind the statutory text at "Congress' purpose" and what it perceived to be the "historical context" of the McCarran Amendment.[9] 44 F.3d 766. (App. 19.)

This approach is flatly inconsistent with this Court's recent rulings (1) that the "unambiguous waiver" of sovereign immunity must be "an expression in the statutory text," and may not be found by reference to matters outside the text, *United States v. Nordic Village, Inc.*, 503 U.S. 30 (1992); and (2) that where a "plausible" reading of a provision does not extend the waiver to a particular circumstance, the broader reading "is not 'unambiguous' and should not be adopted." *Ibid.* Instead, the lower court employed a relaxed approach to construing an immunity

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[9] Curiously the court of appeals nevertheless ignored the fact that, at approximately the same time that the McCarran Amendment was enacted, Congress considered but did not act upon a bill which in part provided:

> Sec. 2. All federal officers, agencies, and employees are authorized and directed to submit to the jurisdiction of the appropriate judicial *and administrative agencies* and tribunals of the several States in matters concerning the acquisition, determination and exercise of rights to the use of water or the administration of such rights.

H.R. 7691, 82nd Cong., 2d Sess. (1952) (emphasis added). This shows Congress considered but rejected the precise result the court below has now sanctioned.

waiver and allowed its perception of the "historical context" to hold sway over the plain meaning of Congress' actual words.

This case should be reviewed for this reason alone, because this Court should clarify whether immunity waivers in general should be subjected to this diminished standard. More particularly, the approach has pronounced practical impacts in water rights litigation.

B. There are sound reasons for applying, in the instant water rights case, the established rules of construction for waivers of federal sovereign immunity from suit.

Under the Oregon water adjudication process, there is no judicial participation whatsoever until all agency activities are completed and enforcement of the administrative decision has begun. ORS 539.130(4). The court below wrongly stated both that there is "no material distinction" between initiating proceedings in court and initiating proceedings through an administrative procedure followed by judicial review, and that "[t]here is no reason to think that Congress meant its waiver to turn on such a technical distinction." 44 F.3d at 767. (App. 22.) Quite to the contrary, Congress had good reason to waive immunity *only* with respect to judicial proceedings because of the procedural protections available only in the courts, and because of the impartiality provided by judicial decision makers. There are at least two practical problems raised by the court's holding.

First, the Oregon circuit court has no jurisdiction over proceedings before the state agency. In this circumstance, the only opportunity for claimants to resolve questions over the propriety of the proceeding is the filing of separate lawsuits like this one. The existing ruling is thus likely to engender further litigation ancillary to state adjudication of water rights.

Second, without judicial oversight procedural, evidentiary, and fairness problems will accumulate at the administrative level. Rather than judicially effecting midcourse corrections as the administrative record develops, the entire agency proceeding will be at stake when it gets to the state circuit court. With everything at stake, reviewing courts will find it difficult to deal with particular claims and challenges on their merits.

It is bad enough that the court below based its holding on the mistaken view that there are no real differences between agency proceedings and judicial proceedings. This novel proposition alone would warrant review in this Court. But the court then compounded the error by applying the proposition to effect an extremely liberal statutory interpretation in the field of sovereign immunity waiver, a field in which this Court has repeatedly required strict fidelity to the specific words chosen by Congress. The error, its application, and the unfortunate effects thereof require that the case be reviewed to bring the outcome into line with the Court's precedents.

3. THIS CASE PRESENTS UNRESOLVED DUE PROCESS QUESTIONS ABOUT THE COMBINATION OF ADVOCACY AND ADJUDICATORY ROLES WITHIN THE SAME ADMINISTRATIVE AGENCY; DECISIONS OF THE FEDERAL COURTS CONFLICT ON THE POINT.

In *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 571 (1983), this Court announced that state proceedings

> alleged to abridge Indian water rights protected by federal law can expect to receive, if brought for review before this Court, a particularized and exacting scrutiny commensurate with the powerful federal interest in safeguarding those rights from state encroachment.

This is such a case. Specifically, the abridgement arises as a violation of the Tribe's due process right to an unbiased decision maker, because of the combination of advocacy and adjudicatory functions in a way not heretofore addressed by this Court.

A. The state has vehemently advocated against the existence of the tribal water rights it now seeks, as adjudicator, to quantify.

In a series of lawsuits the State of Oregon has steadfastly opposed the very existence of critical Klamath tribal treaty rights. In *Kimball v. Callahan ("Kimball I")*, 493 F.2d 564 (9th Cir. 1974), *cert. denied*, 419 U.S. 1019 (1974), the existence of the Tribe's treaty-protected hunting, fishing, and gathering rights was confirmed. The state relitigated this point in *Kimball v. Callahan ("Kimball II")*, 590 F.2d 768 (9th Cir. 1979), *cert. denied*, 444 U.S. 526 (1979), but the tribal rights were again upheld.

In *Adair*, the state took the position that no water right at all attached to the Tribe's hunting, fishing, and gathering rights despite the fact that the deprivation of water could entirely destroy those rights. The federal courts rejected the state's vehement argument and ruled that the Tribe indeed has a right to water necessary to protect its treaty hunting, fishing, and gathering rights.[10] *United States v. Adair*, 478 F.Supp. 336 (D. Or. 1979), *aff'd*, 723 F.2d 1394 (9th Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984). In all, at least eighteen lawyers in the Oregon Department of Justice (ODOJ) participated in advocating against the treaty rights, including water rights, of the Tribe. Several of these lawyers are still active in the ODOJ.

Now the state seeks to change roles from that of advocate to that of adjudicator. ODOJ, whose director runs for election with a distinctly political agenda, will provide legal advice to OWRD, whose director is a political appointee of the Governor, as OWRD quantifies the water rights of the Klamath Tribe. ORS 180.060. ODOJ will also represent OWRD in any judicial review of OWRD's administrative decision. ORS 539.150. Eventually a judicial decree will set the amount of the Tribe's water rights, with the decision being based on an administrative record developed under the *exclusive* control of ODOJ and OWRD.

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[10] The state argued in its briefs that federal court affirmation of tribal water rights would require that "western civilization must cease" in affected areas, and that tribal water rights lead to "impossible complications" that are "wholly impractical" and results that are "crudely unfair".

B. This Court should review the acceptability, for due process purposes, of the state agencies' shift in role from advocate to adjudicator in the same proceeding.

This Court has reviewed and approved, over a due process challenge, the combination of *investigatory and adjudicatory* functions in the same state or federal agency. But the Court has not addressed the due process implications of the combination of *advocacy and adjudicatory* functions. The leading cases dealing with allegations of agency bias have carefully characterized as investigation, rather than advocacy, the agency activities from which the allegation of bias grew. Indeed, the Court has strongly suggested that the adjudicatory and advocacy combination is unacceptable.

For example, in *Withrow v. Larkin*, 421 U.S. 35, 55 (1975), the Court established a presumption of agency objectivity based on the agency's "*nonadversary* investigative procedures" (emphasis added). And in *Richardson v. Perales*, 402 U.S. 389, 410 (1971) (rejecting a claim that a Social Security worker who had developed the facts of a case should not thereafter be allowed to act as hearing examiner), the Court based its ruling on its finding that the examiner "does not act as counsel."

Not surprisingly, when agency personnel, particularly legal counsel, manifest the attitudes of an advocate or litigant, the lower courts have for some time taken a skeptical view of the agency's ability to act also as judge. For example, in *Trans World Airlines v. CAB*, 254 F.2d 90 (D.C. Cir. 1958), the Post Office's legal counsel, after signing a brief for the Post Office in a particular case,

became a member of the CAB and sat in review of the same case; the court found this violative of due process.

Most recently in *Walker v. City of Berkeley*, 951 F.2d 182 (9th Cir. 1991), a city employee challenged the propriety of her discharge because the city's attorney acted both as an advocate defending the city in a lawsuit over the matter, and as legal advisor in the city manager's administrative adjudication of the case. The court held that the tandem, conflicting roles of the attorney deprived the employee of her due process right to an unbiased decision maker in the administrative proceeding.[11]

The court below reached a decision at odds with the principles of these appellate opinions. There is as yet no dispositive guidance from the Court regarding the combination of advocacy and adjudicatory roles within the same agency. The troubling questions raised by that combination of roles provides a clear instance of state activity "alleged to abridge Indian water rights protected by federal law" contemplated by this Court in *San Carlos Apache Tribe* as being worthy of review.

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[11] *See also Association of National Advertisers, Inc. v. FTC*, 460 F.Supp. 996, 998 (D. D.C. 1978), reversed on other grounds, 627 F.2d 1151 (D.C. Cir. 1979), *cert. denied* 447 U.S. 921 (1980) ("affirmative efforts to propagate [an administrator's] settled views" on a particular subject disqualify the administrator from participation in further agency review of the subject).

CONCLUSION

For the foregoing reasons, Petitioner, the Klamath Tribe, respectfully submits that this Court should grant the Petition for a Writ of *certiorari* and reverse the judgment of the court below.

Dated this 25 day of June, 1995.

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellant,* and KLAMATH ALLOTTEES WATER USERS ASSOCIATION; KLAMATH TRIBE, *Plaintiffs-Intervenors,* v. STATE OF OREGON, Water Resources Department, and WILLIAM H. YOUNG, Director, *Defendants-Appellees.*	No. 92-36983 D.C. No. CV-90-01329-HJF **OPINION**
UNITED STATES OF AMERICA, *Plaintiff,* and KLAMATH ALLOTTEES WATER USERS ASSOCIATION, *Plaintiff-Intervenor,* and KLAMATH TRIBE, *Plaintiff-Intervenor-Appellant,* v. STATE OF OREGON, Water Resources Department, and WILLIAM H. YOUNG, Director, *Defendants-Appellees.*	No. 92-36985 D.C. No. CV-90-01329-HJF

UNITED STATES OF AMERICA, *Plaintiff,* and KLAMATH ALLOTTEES WATER USERS ASSOCIATION, *Plaintiff-Intervenor-Appellant,* v. STATE OF OREGON, Water Resources Department, and WILLIAM H. YOUNG, Director, *Defendants-Appellees.*	No. 92-36987 D.C. No. CV-90-01329-HJF

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* and KLAMATH ALLOTTEES WATER USERS ASSOCIATION; KLAMATH TRIBE, *Plaintiffs-Intervenors,* v. STATE OF OREGON, Water Resources Department, and WILLIAM H. YOUNG, Director, *Defendants-Appellants.*	No. 92-37001 D.C. No. CV-90-01329-HJF

Appeal from the United States District Court
for the District of Oregon
Helen J. Frye, District Judge, Presiding

Argued and Submitted
May 2, 1994 – Portland, Oregon

Filed December 28, 1994

Before: Arthur L. Alarcon, William A. Norris,
and Edward Leavy, Circuit Judges.

Opinion by Judge Norris

SUMMARY

Government Law/Native Americans/Immunity

The court of appeals affirmed a judgment of the district court in part and reversed in part. The court held that under the McCarran Amendment, Congress has waived the United States' and Indian tribes' sovereign immunity from suits under state law for the comprehensive administrative and judicial adjudication of water rights in river systems.

The McCarran Amendment provides that the United States consents to being joined in "suits" for the adjudication of water rights in a river system or other source and waives its sovereign immunity in connection with such litigation. The statute also declares that there can be no costs judgment against the government in such suits.

In 1990, appellee State of Oregon issued notices of its intention to adjudicate water rights in the Klamath basin. Appellant United States filed a declaratory action alleging that it had not waived sovereign immunity and did

not have to pay any filing fees or register its water claims pursuant to the Oregon water rights adjudication statute to preserve its rights. Appellee Klamath Tribe intervened, adding the allegation that subjecting it to adjudication by the State of Oregon denied it of due process because the State had a history of hostility to the Tribe's water rights. The State countered that the McCarran Act waived the government's sovereign immunity and that the Tribe's bias claim was baseless.

The district court granted summary judgment for the State. The court held that the McCarran Amendment waived sovereign immunity on behalf of the United States and the Tribe. The court also held that the government could be required to pay filing fees for the State adjudication, but could not be compelled to register its water claims. Lastly, the court held that by treaty, the Tribe did not have to pay the fees, and that it was otherwise subject to the State procedure.

Following the district court's decision, appellant Klamath Allottees Water Users Association intervened, claiming the same rights as the Tribe. The district declined to extend its ruling to the Association.

On appeal, the government contended that Oregon's mass adjudication scheme is not a "comprehensive suit" of the kind contemplated by the McCarran Amendment because much of the proceedings are before an administrative agency rather than a court and because the adjudication is insufficiently comprehensive. The United States also contended that even if the Oregon statutory proceedings were deemed to be a "suit," they are not sufficiently comprehensive because the rights of some claimants are

not subject to attack and because groundwater rights are not decided in the same proceeding, i.e., the purposes of the Amendment are best served by adjudication of all hydrologically-related water sources.

[1] Under the Oregon statute, water rights are assigned according to a judgment of a court which has held hearings in which the United States has been joined as a defendant. That an administrative agency should "pave the way" for an adjudication by the court does not make the label "suit" inappropriate. [2] The language of the McCarran Amendment expressly waives immunity. The question was whether the present case was one of the adjudications to which the express waiver applied. The scope of such waiver can only be ascertained by reference to underlying congressional policy. [3] The court therefore had to look to the Amendment's historical context and purposes to evaluate the government's argument that it applies only to "traditional" civil suits.

[4] The Supreme Court has recognized that Congress had in mind not only traditional suits in equity but also hybrid adjudications taking advantage of the expertise of nonjudicial officials. [5] The participation of administrative agencies is at the core of most of the comprehensive state systems for adjudication of water rights contemplated by the McCarran Amendment. [6] Whether the case is initiated in court then referred to an agency for administrative proceedings, or is initiated through an administrative procedure before being reviewed by a court is not a material distinction for purposes of the McCarran Amendment.

[7] All existing water rights claims in the river system would have to be determined when the adjudication is finished. The comprehensiveness standard requires the consolidation of existing controversies, not the reopening of settled determinations. [8] The absence of owners of previously decreed rights might present problems on the merits if a collision develops between them and any reserved rights of the United States, but all such questions are federal and can be reviewed by the court of appeals after final judgment by the state court.

[9] The comprehensiveness requirement does not mandate that every hydrologically-related water source be included in the adjudication. [10] While the adjudication must avoid excessively piecemeal litigation of water rights, it need not determine the rights of users of all hydrologically-related water sources.

[11] The law treats groundwater and surface water as distinct objects. While the trend has been to a greater recognition of the connection between ground and surface waters, it is too recent and incomplete to infer that Congress intended to require comprehensive stream adjudications to include adjudication of groundwater rights as well. [12] The Klamath Basin adjudication was the sort of adjudication Congress meant to require the United States to participate in when it passed the McCarran Amendment.

[13] The United States has not consented to be a part of the process of filing registration statements describing claims to water rights. [14] While the information obtained by the registration system regarding claims not yet at issue might be useful in future adjudications,

the process cannot be described as part of the state's adjective law for the adjudication of water rights claims. The connection between registration and adjudication is too tenuous.

[15] In order to prevail in its claim, the Tribe had to show an unacceptable probability of actual bias by those with decisionmaking power over its claims. It was not enough to show that the State had taken positions adverse to the Tribe's claims in this case. [16] The Tribe did not show how Oregon's prior hostility to certain treaty rights could affect its factual inquiry.

[17] The record was devoid of facts that might have been relevant to the Association's claims. [18] It appeared that the district court merely denied the Association's motion to amend the judgment to extend the relief granted to the Tribe to the Association's members, leaving the complaint in intervention unadjudicated. The district court's order was not a final judgment disposing of the Association's complaint. The appeal therefore had to be dismissed for lack of jurisdiction.

COUNSEL

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Rives Kistler, Assistant Attorney General, Salem, Oregon, for the defendants-appellees-cross-appellants State of Oregon and William H. Young.

OPINION

NORRIS, Circuit Judge:

These consolidated appeals arise out of the State of Oregon's attempts to adjudicate the rights of various claimants to the waters of the Klamath River Basin through a complex procedure created by state statute. We are called upon to address whether the State may compel the United States, the Klamath Indian Tribe and other owners of former reservation land to comply with certain terms of the states statute governing the Klamath Basin adjudication.

I

Facts and Procedural History

In 1975, the Oregon Water Resources Department (OWRD) invoked Oregon's statutory procedure for the mass adjudication of water rights in order to determine all claims to surface water in the Klamath River Basin. The United States claims water rights in this basin on behalf of several federal agencies and as trustee for the

Klamath Tribe. The State notified over 25,000 potential claimants, including appellants United States, the Klamath Tribe and members of the Klamath Allottees Water Users Association (Association), a group of individuals who own former reservation land in fee. That same year, the United States filed a suit in federal district court seeking a declaration of the water rights of the United States and the Klamath Tribe in certain tributaries within the Klamath Basin. In 1983, this court heard an appeal from the district court's decision in that case. *See United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984). We held that the United States and Klamath Tribe possessed reserved water rights to the rivers at issue in the litigation, but left the quantification of those rights to a comprehensive state adjudication of water rights under the provisions of the McCarran Amendment, 43 U.S.C. § 666. *Id.* at 1406. We further stated, "although the Oregon water rights adjudication system is initially administrative and need not be judicial in nature, we will assume, without deciding, for the purposes of this case that it is not too informal to qualify as a 'suit' within the meaning of McCarran Amendment or a 'comprehensive state adjudication' within the meaning of *Colorado River* and *Sam Carolos Apache Tribe*," *Id.* at 1405 n.9 (citations omitted).

In 1990, the State reissued notices of its intention to adjudicate water rights in the Klamath Basin. In response, the United States, as owner of federal land in the Klamath Basin and as trustee for the Klamath Tribe, filed the present action in federal district court seeking a declaratory judgment that the United States has not waived its sovereign immunity and that it need not register its water

claims or pay any filing fees to preserve its water rights. The Klamath Tribe intervened, joining the claims of the United States to the protection of sovereign immunity and also asserting that subjecting the Tribe to an adjudication by the State of Oregon deprived the Tribe of due process because the State had a history of hostility to the Tribe's treaty rights, including its claims to water in the Klamath Basin. The State countered that the McCarran Amendment waived the United States' sovereign immunity and that the Tribe's claims of bias were baseless.

After hearing cross-motions for summary judgment, the district court held that in enacting the McCarran Amendment, Congress had waived sovereign immunity on behalf of the United States and Klamath Tribe and consented to their participation in the Klamath Basin adjudication. The court held that the United states could be compelled to pay filing fees for the adjudication, but could not be forced to register all of its water claims throughout the state. The court further held that an 1864 Treaty between the United States and the Tribe precluded the States from requiring filing fees from the Tribe,[1] but that otherwise subjecting the Tribes to the state procedure did not violate their due process rights.

After the court issued its summary judgment decision, *United States v. Oregon Water Resources Dept.*, 774 F.Supp. 1568 (D. Or. 1991), the Klamath Allottees Water Users Association intervened, claiming to hold the same rights as the Tribe. Members of the Association own property that was once held in trust for the Tribe, but

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[1] This ruling has not been appealed.

later transferred to individual tribe members in fee pursuant to federal statutes. Without explanation, the district court declined to extend the ruling to the Association's members. These appeals followed, raising the issues we left undecided in *Adair*. We affirm the summary judgment, with the exception of the district court's ruling that the United States can be required to pay filing fees. We further dismiss the Association's appeal for lack of jurisdiction.

II

Sovereign Immunity

Unless the McCarran Amendment waived the sovereign immunity of the federal government and the Tribe, neither may be required to participate in a state adjudication in order to preserve water rights that have accrued under federal law. *See Colorado River Water Conservation District v. United States*, 424 U.S. 800, 809-813 (1976). The McCarran Amendment provides:

> § 666. Suits for adjudication of water rights
>
> (a) Joinder of United States as defendant; costs
>
> Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source. . . . The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof,

> in the same manner and to the same extent as a private individual under like circumstances: *Provided,* That no judgment for costs shall be entered against the United States in any such suit.
>
> (b) Service of summons
>
> Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

The United States argues that Oregon's mass adjudication scheme is not the sort of "comprehensive suit" contemplated by the statute because much of the proceedings are before an administrative agency rather than a court and because the adjudication is insufficiently comprehensive. In order to decide whether Congress intended to waive the United States' sovereign immunity for water rights proceedings such as those held under Oregon's statute, we must examine both the McCarran Amendment and the Oregon statute, paying particular attention to their historical contexts.

In the nineteenth century, water rights in Oregon were acquired by appropriation or riparian right, or accrued to the United States and Indian Tribes under federal law as federal reserved rights. *See* 1 Robert E. Beck, *Waters and Water Rights* § 8.02(c) (1991). Under an appropriation system, as such systems developed in the West, the first party to divert water for a beneficial use has the right to continue to divert that amount of water without interference from subsequent appropriators so long as the water continues to be put to beneficial use. In case of shortages, the entire share of the most recent appropriator is lost before the share of the next latest

appropriator is diminished. Under such a system, the date of appropriation and the amount of water appropriated are the critical facts in the determination of the relative rights of water users.

As was traditional in Western states, the relative rights of various claimants to water from a river system were determined piecemeal, as conflicts arose, in traditional lawsuits in equity. *See* 2 Beck, *supra* § 15.01; Samuel C. Wiel, *Water Rights in the Western States* § 624 (3d ed. 1911). As the West became more populated, conflicts over water rights increased. As the interrelation of water rights became more apparent, a dilemma emerged: the nature of traditional civil litigation made joinder of the hundreds or thousands of claimants to a river system extremely cumbersome and inefficient,[2] while less comprehensive adjudications were of little value. As the Supreme Court noted in *Pacific Live Stock Co. v. Oregon Water Bd.*, 241 U.S. 440, 449 (1916), in an adjudication of water rights,

> the rights of the several claimants are so closely related that the presence of all is essential to the accomplishment of its purposes, and it hardly needs statement that these cannot be attained by mere private suits in which only a few of the claimants are present, for only their rights as between themselves could be determined.

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[2] For instance, in *Salt Lake City v. Anderson*, 148 P.2d 346 (Utah 1944), a traditional suit in equity to adjudicate rights in the Jordon River grew to over 10,000 parties.

As it became clear that the necessary scope of comprehensive water rights adjudication could not be accommodated by traditional litigation procedures, Western states began to develop alternate, statutory adjudication systems for the mass determination of the rights of all claimants in a river system. *See* 2 Beck, *supra* § 15.01; 2 Wells A. Hutchins, *Water Rights in the Nineteen Western States* 447-48, 451-70.

In 1909, Oregon created its present statutory system for the mass adjudication of surface water rights. After 1909, water rights could only be acquired through a permit system established by the statute. Or. Rev. Stat. § 537.120. However, all water rights that had vested prior to 1909, but had never been subject to a judicial determination, have been left intact as "undetermined vested rights." *Id.* at §§ 536.007(11), 539.010. The statute requires that every person or entity claiming an undetermined vested right must file a "registration statement" describing the claim and including the information necessary to determine the claimed vested or reserved right. *Id.* at § 539.240(1).[3] The purpose of the registration is to preserve evidence of pre-1909 claims until those claims are subject to adjudication under the statute. The registration statement must be accompanied by a fee that is calculated according to the type and extent of the water's use. *Id.* at § 539.081.

Upon petition by a claimant, or on its own initiative, the Oregon Water Resources Department may commence

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[3] Failure to register a claim creates a rebuttable presumption that the claim has been abandoned. Or. Rev. Stat. § 539.240(3).

the adjudication of the rights of all claimants to a river or stream. Or. Rev. Stat. § 539.021. Notice must be given to all interested parties. *Id.* at §§ 539.030, 539.040(2). Those claimants who have already been issued water certificates through the permit system are not required to participate in the adjudication in order to preserve their rights as already determined. *Id.* at § 539.100. However, those with undetermined claims to the water of the system are required to appear and submit proof of their claims before the OWRD. The OWRD accepts claims and objections to claims, surveys the river system, takes evidence and holds hearings regarding contested claims. *Id.* at §§ 539.070, 539.100, 539.110, 539.120. After these hearings, the OWRD makes findings of fact and an order determining the parties' water rights. *Id.* at § 539.130. This order is effective upon issuance unless a party wishes to contest the order and files a bond. *Id.* at § 539.140(4). After the order is filed, a judicial hearing is scheduled and notice of that hearing is given to the participants. *Id.* at § 539.140. Parties objecting to the department's order must file written exceptions with the court in order to preserve their objections. *Id.* at § 539.150. If no objections are filed, the court must enter a judgment affirming the order. *Id.* at § 539.150(3). Otherwise, a hearing is held at which contesting parties may offer evidence as in a normal civil case. *Id.* at §§ 539.150(1), 539.150(3). The court may remand the case to the OWRD or other referee for further findings, followed by another judicial hearing. *Id.* at § 539.150(3). At the final judicial hearing, the court reviews the exceptions and then enters a judgment affirming or modifying the order as it considers proper. *Id.* at § 539.150(4). This judgment is appealable to the

Oregon Court of Appeals in the same manner as any other civil judgment. *Id.*

The system adopted by Oregon at the turn of the century served as a model for Arizona, California, Nevada and Texas. *See* 2 Hutchins, *supra* at 456-57. By the time the McCarran Amendment was passed, most Western states had adopted some statutory procedure for the mass adjudication of water rights. *See* 1 *id.* at 302-03; *infra* notes 7-8. While these statutory adjudications seemed to promise an end to the confusing and conflicting adjudication of water rights in multiple cases, the system was impaired by the refusal of the federal government to participate. Since the United States had large land holdings and extensive reserved water rights in the West, its claims of sovereign immunity significantly diminished the value of the comprehensive state adjudications. Congress sought to remedy this problem by enacting the McCarran Amendment in 1952. *See* S. Rep. No. 755, 82d Cong., 1st Sess. 4-6 (1951).

Against this background, we must consider the United States' contention that the McCarran Amendment does not and was not meant to extend to Oregon's statutory procedure for adjudicating water rights in river systems.

A

Suit or Administrative Proceeding

[1] The United States argues that Oregon's adjudication of water rights does not constitute a "suit" but rather an "administrative proceeding" outside the plain

language of the McCarran Amendment. The Supreme Court heard a similar argument regarding the proper characterization of Oregon's water rights adjudication process in *Pacific Live Stock Co. v. Oregon Water Bd.*, 241 U.S. at 440. In that case, the plaintiff sought a declaration that Oregon's statute violated the due process clause of the Fourteenth Amendment because it permitted water rights to be adjudicated by an administrative agency rather than a court. The Court wrote:

> A serious fault in this contention is that it does not recognize the true relation of the proceeding before the board to that before the court. They are not independent or unrelated, but parts of a single statutory proceeding, the earlier stages of which are before the board and the later stages before the court. . . . [T]he board merely paves the way for an adjudication by the court of all the rights involved. As the Supreme Court of the State has said, the board's duties are much like those of a referee.

Id. at 451. In the end, water rights are assigned according to a judgment of a court which has held hearings in which the United States has been joined as a defendant. That an administrative agency, magistrate, referee or special master should "pave the way for an adjudication by the court" does not make the label "suit" inappropriate.

[2] The United States argues, however, that we are required to construe narrowly the language of any statute waiving sovereign immunity and that an appropriately narrow construction of the McCarran Amendment allows joinder of the United States only in traditional lawsuits

initiated in court and tried exclusively before a judge.[4] In *United States v. Idaho*, 113 S.Ct. 1893, 1896 (1993), the Supreme Court emphasized that "waivers of federal sovereign immunity must be 'unequivocally expressed' in the statutory text." The plain language of the McCarran Amendment, however, expressly waives immunity. The question in this case is whether the case at bar is one of those adjudications, described in the provision, to which this express waiver applies. Although an examination of Congress' purposes and the historical context of the statute may not serve to waive immunity when the text of the statute fails to do so unequivocally, *see United States v. Nordic Village, Inc.*, 112 S.Ct. 1011, 1016 (1992), the "scope of such a waiver can only be ascertained by reference to underlying congressional policy." *Franchise Tax Bd. v. United States Postal Service*, 467 U.S. 512, 521 (1984). The Supreme Court has repeatedly looked to indicia of Congressional intent in order to construe the scope of the unequivocally expressed waiver of immunity in the McCarran Amendment. *See Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 564-65 (1983) (examining purposes of

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[4] The Tribe argues that we are required to narrowly construe the McCarran Amendment so as to preclude their joinder in this case in order to avoid the Constitutional questions they raise about the fundamental fairness of Oregon's adjudicative system. This argument is without merit. While "[f]ederal statutes are to be so construed as to avoid serious doubt of *their* constitutionality," *International Ass'n of Machinists v. Street*, 367 U.S. 740, 749 (1961) (emphasis added), we know of no case requiring us to construe a federal statute so as to avoid reaching a constitutional challenge to a completely different *state* statute or procedure.

the Amendment in holding that it waives Indian sovereign immunity in all states); *Colorado River,* 424 U.S. at 810-812 (holding that the objectives and legislative history of McCarran Amendment support applying waiver to adjudication of federal reserve water rights held by the United States in trust for Indian Tribes); *United States v. District Court for Eagle County,* 401 U.S. 520, 525 (1971) (looking to legislative history to determine how "comprehensive" Congress required the adjudications to be in order to qualify for waiver of immunity).

[3] Thus, we must look to the Amendment's historical context and purposes to evaluate the United States' argument that the McCarran Amendment applies only to "traditional" civil lawsuits. The United States points out that at the time of the McCarran Amendment's passage, Oregon, like most Western states, continued to allow water rights to be adjudicated in traditional civil suits notwithstanding its statutory adjudication scheme. *See* Or. Rev. Stat. § 539.021(2); 2 Hutchins, *supra* at 63-67. Based on this observation, the United States argues that Congress meant to waive immunity to joinder in these traditional adjudications, but not to participation in statutory adjudications in which administrative agencies play a central role.

[4] This argument ignores that Congress limited its waiver to "comprehensive water right adjudication[s]." *United States v. Idaho,* 113 S.Ct. at 1894. As the Supreme Court noted in *Colorado River,*

> The consent to jurisdiction given by the McCarran Amendment bespeaks a policy that recognizes the availability of comprehensive state systems for adjudication of water rights. . . . As

> has already been observed, the Colorado Water Rights Determination and Administration Act established such a system for the adjudication and management of rights to the use of the State's waters.

424 U.S. at 819. Thus, the Supreme Court considered the statutory scheme adopted by Colorado to be one of the "comprehensive state systems" Congress had in mind when passing the McCarran Amendment. The Colorado system does not rely upon traditional equity lawsuits for comprehensive river adjudications. Rather, like the statutory scheme in Oregon, Colorado's system involves an initial adjudication by nonjudicial officers, known as "Water Referees," subject to review by a state court. *See* Colo. Rev. Stat. Ann. §§ 37-92-101 *et seq.* (1974); *see also* 6 Beck, *supra* at 65-66. As the Supreme Court explained, "[e]ach month, Water Referees in each Division rule on applications for water rights filed within the preceding five months or refer those applications to the Water Judge of their Division. Every six months, the Water Judge passes on referred applications and contested decisions by Referees." 424 U.S. at 804 (citations omitted). Thus, when the Supreme Court held that Colorado's system was the sort of comprehensive adjudication contemplated by the McCarran Amendment, it recognized that Congress had in mind not only traditional suits in equity but also hybrid adjudications taking advantage of the expertise of nonjudicial officials.

[5] In fact, the active participation of administrative agencies is at the core of most of the "comprehensive

state systems for adjudication of water rights" contemplated by the McCarran Amendment. While the traditional civil lawsuits may remain viable devices for the comprehensive adjudication of rivers with a small number of claimants, by 1952 it was clear that they were not well-suited for comprehensive adjudication of the rights in large rivers. *See Pacific Live Stock*, 241 U.S. at 449. Comprehensive adjudication of such river systems became practicable after the creation of the complex statutory procedures in the first half of this century. *See* 2 Beck, *supra* § 15.01; 2 Hutchins, *supra* at 444-47. A central feature of these statutory procedures is the involvement of administrative agencies to make an initial determination of the hundreds or thousands of claims filed. 2 Beck, *supra* § 15.01; 1 Hutchins, *supra* at 302; 2 *id.* at 448-51. When Congress consented to the joinder of the United States in comprehensive lawsuits, we presume that it had in mind these statutory procedures which made large scale comprehensive adjudications possible.[5] *See Colorado River*, 424 U.S. at 819.

[6] It may be, however, the Oregon's system is aberrational, relying too heavily on the work of the administrative agency to be considered among those comprehensive adjudications to which the McCarran Amendment applies. However, as the State points out, at the time the McCarran Amendment was passed, Oregon's adjudicatory scheme was firmly established in its present form and had been duplicated in Arizona, California and

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[5] Obviously, we do not decide in this case whether the McCarran Amendment waives sovereign immunity for adjudications under the statutes of any state but Oregon.

Nevada (the home state of Senator McCarran, author of the Amendment).[6] State water agencies or referees in four more states played essentially the same role as the Oregon Water Resources Department, except that the proceedings were initiated in court and then transferred to the agency or referee for investigation and preliminary determination.[7] We agree with the State that whether the case is initiated in court and then referred to an agency for administrative proceedings, or is initiated through an administrative procedure before being reviewed to [sic] a court is not a material distinction for the purposes of the McCarran Amendment. Both sorts of systems were in place when Congress enacted the waiver. There is no reason to think that Congress meant its waiver to turn on such a technical distinction. *See Eagle County*, 401 U.S. at 525. We decline to adopt an interpretation of the McCarran Amendment that would render it inapplicable to the comprehensive adjudication schemes of so many Western states when it was passed.[8]

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[6] *See* Ariz. Code Ann. §§ 75-114 - 75-122 (1939); Cal. Stat. 1633-39 (§§ 2525 - 2774) (1943); Nev. Comp. Laws §§ 7905-7923 (1929).

[7] *See* Mont. Code Ann. §§ 89-848 - 89-855 (1947); N.M. Stat. Ann. §§ 77-406 - 77-407 (1941); Utah Code Ann. §§ 100-4-3 - 100-4-15 (1943); Wash. Rev. Code §§ 7364 - 7377 (1932).

[8] The United States also implies that Congress intended that the Western states would amend their statutory adjudication statutes in order to fall within the confines of the narrow interpretation of the statute advocated by the United States. However, there is no indication that Congress believed there to be a problem with the way the Western states were then conducting mass water rights adjudications. To the contrary, the discussions proceeded upon the assumption that the problem

B

Comprehensiveness

The United States also argues that even if Oregon's proceedings amount to a "suit" within the meaning of the McCarran Amendment, they are not sufficiently comprehensive to fall under the provision because the rights of some claimants are not subject to attack and because groundwater rights are not decided in the same proceeding.

1

Absent Parties

Under the Oregon statute, some aspects of the water rights determined through the permit process after 1909 or through prior adjudication are considered to be conclusively determined and not subject to contest in the Klamath Basin adjudication. *See* Or. Rev. Stat. § 537.270 (water right certificate issued through permit process or after statutory adjudication is to be considered "conclusive evidence of the priority and extent of the appropriation therein described"); *id.* at § 539.100 (party not asserting an undetermined vested right or contesting such a right need not participate in statutory adjudication). The United States contends that this makes the adjudication less than comprehensive.

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was the United States' refusal to participate in the proceedings already existing. *See* S. Rep. No. 755, 82d Cong., 1st Sess. 5-6 (1951).

In *United States v. District Court for Eagle County*, 401 U.S. at 520 and its companion case, *United States v. District Court for Water Div. No 5*, 401 U.S. 527 (1971), the Supreme Court considered a similar attack on the Colorado comprehensive adjudication process. Under the statute, Colorado periodically conducted "supplemental water adjudications" to determine the rights of those claiming to have acquired water rights since the last adjudication of the river system. The United States argued that the adjudication was not comprehensive because water rights determined in previous adjudications were not subject to redetermination. The Court in *Eagle County* stated "[w]e think that argument is extremely technical; and we decline to confine 43 U.S.C. § 666 so narrowly." 401 U.S. at 525. The Court went on to explain in *Water Dist. No. 5* that the adjudication was general because, "[t]he present suit . . . reaches all claims, perhaps month by month but inclusively in the totality." 401 U.S. at 529.

[7] We reject the government's argument in this case as well. As was true in *Eagle County*, all existing water rights claims in the river system will have been determined when the adjudication is finished. Congress was concerned that the United States not be subjected to piecemeal, private water rights litigation. *See Eagle County*, 401 U.S. at 525; *Water Div. No. 5*, 401 U.S. at 529. The comprehensiveness standard requires the consolidation of existing controversies, not the reopening of settled determinations.

[8] The United States and the Tribe argue, however, that Oregon's statutory adjudication will not sufficiently protect their water rights because they will not be

allowed to challenge the water rights certificates issued through the permit system. However, the Supreme Court responded to this concern in *Eagle County*, observing that

> [t]he absence of owners of previously decreed rights may present problems going to the merits, in case there develops a collision between them and any reserved rights of the United States. All such questions, including the volume and scope of particular reserved rights, are federal questions which, if preserved, can be reviewed here after final judgment by the [state] court.

401 U.S. 525-26 (footnote omitted).

2

Groundwater

Because the Klamath Basin adjudication does not attempt to determine the rights of claimants to groundwater in the Basin, the United States argues that the proceedings are not an "adjudication of rights to the use of water of a river system or other source." 43 U.S.C. § 666(a). Arguing that the ground and surface waters of the region are hydrologically interrelated, the United States contends that the failure to include groundwater claims deprives the adjudication of the comprehensiveness intended by Congress.

The text of the Amendment lends little support to the United States' position. On its face, the statute applies to the "water of a river system or other source." Groundwater may be included as an "other source," but the use of "or" strongly suggests that the adjudication may be

limited to *either* a river system *or* some other source of water, like groundwater, but need not cover both. For the United States' argument to succeed, we must read "river system" to include not only the water of the river, but hydrologically-related groundwater systems as well.

In support of this interpretation, the United States refers to cases stating that the Amendment's waiver is limited to "general" or "comprehensive" adjudications. *See, e.g., United States v. Idaho,* 113 S.Ct. at 1894; *Dugan v. Rank,* 372 U.S. 609, 618 (1963). These cases make clear that the adjudication must include the undetermined claims of all parties with an interest in the relevant water source. However, these cases do not address the proper definition of the relevant water source and do not decide if groundwater must be included in an adjudication of a "river system." The United States can point to no other case law, statutory text or legislative history that specifically requires groundwater to be adjudicated as part of the comprehensive adjudication of a "river system."

The United States argues instead that the purposes of the Amendment are best served by an interpretation that requires the adjudication of all hydrologically-related water sources. We agree that the McCarran Amendment was motivated in large part by the recognition of the interconnection of water rights among claimants to a common water source and the desire to avoid piecemeal adjudication of such rights. However, we do not believe that Congress intended to carry the requirement of comprehensiveness as far as the United States would have us do.

[9] The Supreme Court addressed the scope of the comprehensiveness requirement in *Eagle County*, where the State of Colorado attempted to adjudicate the water rights of claimants to the Eagle River and its tributaries. 401 U.S. at 521. The Eagle River is itself a tributary of the Colorado River. *Id.* The United States argued that because the Eagle was hydrologically related to the Colorado, a comprehensive adjudication under the McCarran Amendment must include an adjudication of the entire Colorado River. The Court rejected this contention as "almost frivolous." *Id.* at 523. "No suit by any State could possibly encompass all of the water rights in the entire Colorado River which runs through or touches many States. The 'river system' must be read as embracing one within the particular State's jurisdiction." *Id.* This discussion suggests that, contrary to the United States' assertions, the comprehensiveness requirement does not mandate that every hydrologically-related water source be included in the adjudication.

[10] We conclude that while the adjudication must avoid excessively piecemeal litigation of water rights, it need not determine the rights of users of all hydrologically-related water sources. As one authority has noted:

> [s]cientists have long delighted in pointing out to lawyers that all waters are interrelated in one continuous hydrologic cycle. As a result, it has become fashionable to argue that an effective legal regime should govern all forms and uses of water in a consistent and uniform manner. The law is otherwise.

1 Beck, *supra* § 6.02 (footnote omitted).

[11] One of the ways in which the law has traditionally ignored the exhortation of the scientists is by treating ground and surface water as distinct subjects, often applying separate law to each. While rights to surface water in the Western states have generally been allocated under the appropriation doctrine, the rights to groundwater were traditionally riparian. *See* 3 Beck, *supra* §§ 20.03-20.04; 2 Wiel, *supra* §§ 1039-42. Under the traditional groundwater doctrines of absolute dominion, the American reasonable use rule, and the correlative rights rule, the priority of first use of the groundwater is irrelevant to establishing the relative rights of users of the groundwater. *See* 3 Beck, *supra* § 20.07(b)(2). Thus, a major function of the statutory comprehensive adjudications is made unnecessary – there is no need to establish the relative priority of all users' claims in order to define each user's rights. The United States is correct in arguing that an increased recognition of the relationship between ground and surface water has lead [sic] some states to attempt better coordination between the allocation of surface and groundwater rights, *see* 3 Beck, *supra* § 24.01(b), but that recognition was still emerging at the time the McCarran Amendment was passed.[9] *See id;* 2 Hutchins, *supra* at 634-53. While the trend has been toward a greater legal recognition of the connection between ground and

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[9] It appears that in 1952, the doctrine of prior appropriation was applied to percolating groundwater in Idaho, Kansas, Nevada, Oklahoma, and Utah, while riparian doctrines were applied to groundwater in Arizona, California, Colorado, Montana, Nebraska, New Mexico, North Dakota, Oregon, South Dakota, Texas, Washington, and Wyoming. 2 Hutchins, *supra* at 634-53.

surface waters, that recognition is too recent and too incomplete to infer that Congress intended to require comprehensive stream adjudications under the McCarran Amendment to include the adjudication of groundwater rights as well as rights to surface water.

The Tribe and the United States note that the use of groundwater in the Klamath Basin may have a direct effect on the availability of water to fulfill the reserved water rights guaranteed to them under federal law. They note that the State's distribution of groundwater rights may have the effect of interfering with these federal water rights. The appellants raise legitimate concerns about the relationship between federal reserve water rights in a river and the distribution of water rights in hydrologically-related groundwater. However, these concerns go to the merits of the adjudications. As the Supreme Court has noted, in administering water rights the State is compelled to respect federal law regarding federal reserved rights and to the extent it does not, its judgments are reviewable by the Supreme Court. *See Eagle County,* 401 U.S. at 525-26.

[12] For these reasons, we hold that the Klamath Basin adjudication is in fact the sort of adjudication Congress meant to require the United States to participate in when it passed the McCarran Amendment. Accordingly, federal sovereign immunity imposes no bar to the United States' participation in that process.

III

Assessing Fees Against the United States

The McCarran Amendment provides that notwithstanding its consent to the joinder of the United States in comprehensive water rights adjudications, "no judgment for costs shall be entered against the United States in any such suit." 43 U.S.C. § 666(a). The District Court held that the United States was liable for certain filing fees required by Or. Rev. Stat. § 539.081, notwithstanding the McCarran Amendment's "cost" proviso because the statute assessed "fees" rather than taxing "costs." However, since the district court's decision, the Supreme Court decided *United States v. Idaho*, 113 S.Ct. at 1893, in which the Court held that the McCarran Amendment did not permit Idaho to require the United States to pay filing fees essentially identical to those at issue in this case. *See id.* at 1897-98. On appeal, the State concedes that this decision controls and requires the reversal of the district court's decision on this issue.

IV

Registration Statements

[13] The State argued unsuccessfully below that the United States could be required to file registration statements describing its claims to waters outside of the Klamath Basin, as provided by Or. Rev. Stat. § 539.240. This provision requires those claiming undetermined vested rights or federal reserve rights to file a registration statement of all claims by December 31, 1992. *Id.* The information gathered through the registration process preserves evidence necessary for future comprehensive

adjudications. Without detracting from the merits of the State's registration scheme, we are compelled to hold that the United States has not consented to be a part of this process.

[14] In *United States v. Idaho*, the Court held that with the exception of procedural rules imposing costs or fees on the United States, "the McCarran Amendment submits the United States generally to state adjective law." *Id.* at 1897. Oregon argues that the registration statement requirements are a part of the state adjective law governing the procedure by which comprehensive water rights adjudications are conducted. While the information obtained by the registration system regarding claims not yet at issue in any proceeding may be useful in future comprehensive adjudications, the process cannot accurately be described as part of the state's adjective law for the adjudication of water rights claims. There is no relation between the deadline for filing registration statements and the commencement of the statutory adjudication. The claims thus registered will only be adjudicated "upon the motion of the director or, in the discretion of the director, upon receipt of a petition from one or more appropriators of surface water." Or. Rev. Stat. § 539.021. It is thus possible that many years will pass before a registered claim is adjudicated, if it is ever adjudicated at all. The connection between registration and adjudication is too tenuous for the registration provisions to be characterized as part of the adjudications to which the United States has consented to be joined.

In the absence of a waiver of sovereign immunity, the State may not require the United States or the Tribe to register water rights claims prior to the adjudication of

those claims, nor may it prejudice those claims if no registration statements are filed.

V

The Klamath Tribe's Due Process Claim

The Klamath Tribe claims that requiring it to submit to the Klamath Basin adjudication would deprive it of due process because the state agencies involved in adjudicating their claims have shown a persistent bias against Tribal treaty rights. The district court found that the Tribe had failed to present sufficient evidence of bias to substantiate this claim and entered summary judgment against the Tribe on this issue. We agree and affirm.

The due process clause of the Fourteenth Amendment guarantees the Tribes a fair trial before a fair tribunal, whether it be an administrative agency or a court. *See Withrow v. Larkin*, 421 U.S. 35, 46 (1975). In evaluating the Tribe's claim of biased decisionmaking, we must ask whether the situation is one "in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Id.* at 47.

The Tribe presented evidence to show that the Oregon Department of Justice (ODOJ) has on several occasions argued against the existence of some treaty rights held by the Klamath Tribe.[10] In particular, the Tribe

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[10] The ODOJ argued against the existence of certain hunting and fishing rights under the 1864 Treaty in *Kimball v. Callahan*, 493 F.2d 564 (9th Cir.), *cert. denied*, 419 U.S. 1019 (1974),

points to *United States v. Adair*, 723 F.2d at 1396, where the ODOJ represented the State of Oregon in a suit instituted by the United States for a declaration of its rights and the rights of the Klamath Tribe to waters in a portion of the Klamath River Basin. In that case, the ODOJ vigorously argued, among other things, that the hunting and fishing rights guaranteed by an 1864 Treaty between the United States and the Tribe did not carry with them an implied reservation of water rights or that, even if they did, those rights were terminated when the federal government terminated supervision of the Tribe in 1954. 723 F.2d at 1408, 1411. We held that the Tribe continued to possess a senior, reserved water right sufficient to support the Tribe's hunting and fishing rights. *Id.* at 1410-11, 1414. The quantification of these rights was left to the State of Oregon's statutory adjudication process. *Id.* at 1399. Now that the State of Oregon has begun a statutory adjudication of the Klamath River Basin, as contemplated by our decision in *Adair*, the Tribe argues that the quantification process is tainted by bias due to the ODOJ's past positions opposing the existence of the Tribe's treaty rights.[11]

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and again in *Kimball v. Callahan*, 590 F.2d 768 (9th Cir.), *cert. denied*, 444 U.S. 826 (1979). In these cases, the position of the Tribes was vindicated. The Tribe also cites *Oregon Dept. of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753 (1985), a case in which the Oregon Attorney General defended the state Fish and Wildlife Department in a suit by the Tribes seeking an injunction against state interference with their right to hunt and fish on lands ceded to the state in 1901. However, in that case, the Supreme Court held for the State, finding that no such rights existed. *Id.* at 774.

[11] The Tribe also argues that OWRD is likely to underestimate the Tribe's water rights because the State has a policy of

[15] In order to prevail in their claim, the Tribe must show an unacceptable probability of actual bias on the part of those who have actual decisionmaking power over their claims. *See Withrow v. Larkin*, 421 U.S. at 47. Contrary to the apparent position of the Tribe, it is not enough to show that the State of Oregon, through the acts of certain departments or officials, has taken positions adverse to the Tribe's claims in this case. While courts have traditionally been sympathetic to the fear that tribal treaty rights will receive "inhospitable treatment" in state courts, the Supreme Court has held that this danger in itself is not enough to warrant reading the McCarran Amendment to exclude Indian water rights from comprehensive state adjudications. *Arizona v. San Carlos Apache Tribe*, 463 U.S. at 566-67. Nor is this generalized suspicion of inhospitable treatment enough, in itself, to create a due process bar to subjecting tribal water rights to state adjudication.

"oversubscribing" rivers. The OWRD is authorized to issue water rights certificates to new users even when it is not clear that there will be any water left for the new users once the senior users' rights have been exercised. *See Benz v. Water Resources Commission*, 764 P.2d 594, 598-600 (Or. App. 1988). The Tribe argues that this creates an incentive for the OWRD to minimize the water allocated to senior users in order to assure that water remains for the junior users holding these contingent certificates. The Tribe does not show, however, that any substantial portion of the rivers in the Klamath Basin adjudication are oversubscribed. Nor does it satisfactorily explain why OWRD would prefer the rights of junior users over those of senior users, much less present any evidence that OWRD actually holds such a preference. To the extent such an incentive may exist, the Tribe has not shown that the risk of bias is significant enough to raise a constitutional question.

Even assuming, *arguendo* that prior litigating positions reveal that ODOJ is biased against the Tribe's water rights claims,[12] the Tribe must connect these prior actions to the tribunal that will adjudicate their claims. *See Withrow*, 421 U.S. at 47; *Hammond v. Baldwin*, 866 F.2d 172, 177 (6th Cir. 1989). In order to make this connection, the Tribe asserts that ODOJ will provide legal advice to the Oregon Water Resources Department during its preliminary quantification of the Tribe's water rights. The Tribe acknowledges that the final quantification of water rights will be rendered by a state court, but asserts that the court will make this ruling on the basis of an administrative record developed by OWRD which, it argues, is tainted by its connection with the ODOJ.

[16] We hold that this showing is insufficient to demonstrate an unacceptable probability that the decisionmakers in the Klamath Basin adjudication will be biased against the Tribe's claim. The Tribe has failed to show that the ODOJ will have any significant role to play in the adjudication or any impact on its outcome. The legal issues with respect to the Tribe's rights have already been decided by this court and we must presume that they will be followed by OWRD and the state courts. *See*

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[12] The Tribe's showing of even this fact is fairly weak. The Tribe's only evidence is the litigating position taken by the ODOJ in a number of cases, all of which were adjudicated over a decade ago. By the Tribe's own admissions, many of the lawyers participating in these cases are no longer active at ODOJ. Tribe's Brief at 26. Nor has the Tribe shown that any of the attorneys or other ODOJ officials involved in these cases will be involved in whatever role the ODOJ will play in the Klamath Basin adjudication.

Withrow v. Larkin, 421 U.S. at 47 (courts must entertain a "presumption of honesty and integrity in those serving as adjudicators"). All that is left for the tribunals in the Klamath Basin adjudication is the quantification of those rights, a fact-intensive inquiry that will be undertaken initially by the OWRD. The Tribe has not shown how the ODOJ's prior hostility to certain Treaty rights could affect this factual determination, a determination that is ultimately enforced only after review by state court judges whose integrity has not been questioned by the Tribe.

Because the evidence proffered by the Tribes does not sufficiently show an unacceptable probability of actual bias by the actual decisionmakers in the Klamath Basin adjudication, the district court properly granted summary judgment in favor of the State.

VI

Allottees' Claim

Appellant Klamath Allottees Water Users Association appeals from the district court's denial of its motion to amend the court's summary judgment ruling to extend the relief granted the Tribe to the members of the Association. The Association claimed that its members enjoyed the same sovereign immunity as the Tribe[13] and that the 1864 Treaty which bars the State from imposing filing fees on the Tribe also exempted the members of the Association.

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[13] Although the court had ruled against the Tribe on its sovereign immunity claims, the Association wished to assure itself the benefit of any reversal of these claims upon appeal.

The Association's appeal comes before this court in an unusual posture. The Association moved to intervene late in the litigation. The Association filed its motion with attached complaint in intervention after the other parties had already filed cross-motions from summary judgment. the district court issued its summary judgment ruling before entertaining the Association's motion to intervene. However, the district court held off entering a final judgment until it could hear the Association's motion. The motion to intervene was granted without objection, after which the Association filed its motion to amend the court's summary judgment ruling. The other parties filed supporting and opposing memoranda.[14] Without explanation the court denied the Association's motion in a minute order. When the district court entered final judgment, it noted having denied the motion, but did not otherwise indicate that judgment was being entered on the merits of the Association's complaint in intervention. The Association filed a timely notice of appeal.

The Association's motion to amend the summary judgment ruling adopted the summary judgment motion of the Tribe. C.R. 97, at 8. The district court might have considered the Association's motion as a motion for summary judgment and the State's opposition to the motion as a cross-motion for summary judgment against the Association. If this had been the case, the district court's minute order might have been read as denying summary

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[14] The United States opposed the motion insofar as it argued that the Association's members were entitled to any sovereign immunity. The State opposed the motion in its entirety. The Tribe supported the claims of the Association.

judgment to the Association and granting it to the State. However, it is not at all clear that this is what the district court meant to do.

[17] While all the parties to the appeal treat the district court's resolution of the Association's motion as a judgment on the merits of its claims, it is difficult to understand how the district court could have made such a determination based upon the state of the record. The record is devoid of certain facts that might be relevant to the merits of the Association's claims. For instance, it is not clear whether members of the Association are also members of the Tribe or are non-Indians who acquired their land from original Indian allottees. *See* Brief of Appellant Klamath Allottees Water Users Association, at 9 n.9. Nor does the record show whether the allottees came to have title to the allotments in fee as a result of the General Allotment Act, 25 U.S.C. § 331 *et seq.*, or under the Klamath Termination Act, 25 U.S.C. § 564 *et seq.* *See* Reply Brief of Appellant Klamath Allottees Water Users Association, at 1. Such distinctions may be important in the eventual adjudication of the members' rights. In the face of an incomplete record, we are reluctant to reach out to decide the merits of the Association's complaint.

[18] It appears that the district court, having granted the Association's motion for leave to intervene and file a complaint in intervention, merely denied the Association's motion to amend the court's judgment to extend the relief granted the Tribe to the Association's members, leaving the Association's complaint in intervention unadjudicated. Because the district court's order is not a final judgment disposing of the Association's

complaint in intervention, the appeal is dismissed for lack of jurisdiction. 28 U.S.C. § 1291.

In Nos. 92-36983, 92-36985 and 92-37001, the district court's summary judgment is REVERSED with respect to its ruling on the imposition of filing fees on the United States and is AFFIRMED in all other respects. The appeal in No. 92-36987 is DISMISSED and the case is REMANDED to the district court for further proceedings.

APPENDIX B

UNITED STATES of America, Plaintiff,

and

Klamath Tribe, Plaintiff-Intervenor,

v.

STATE OF OREGON WATER RESOURCES DEPARTMENT and William H. Young, its Director, Defendants.

Civ. No. 90-1329-FR.

United States District Court,
D. Oregon.

Sept. 30, 1991.

Charles H. Turner, U.S. Atty., D. Or., Portland, Or., Gary B. Randall, Michael A. Gheleta, Peter Monson, John P. Lange, U.S. Dept. of Justice, Environment & Natural Resources Div., Washington, D.C., for plaintiff.

Carl Ullman, Water Adjudication Project, The Klamath Tribe, Chiloquin, Or., Melody McCoy, Walter Echo-Hawk, Native American Rights Fund, Boulder, Colo., for plaintiff-intervenor.

Dave Frohnmayer, Atty. Gen., Stephanie L. Striffler, Eric J. Bloch, Asst. Attys. Gen., Salem, Or., for defendants.

OPINION

FRYE, District Judge:

The matters before the court are:

1) the motion for summary judgment of plaintiff, the United States of America (#52);

2) the motion for summary judgment of plaintiff-intervenor, the Klamath Tribe (#55); and

3) the motion for summary judgment of defendants, the Water Resources Department of the State of Oregon and William H. Young, its Director (#54).

In its complaint, the United States seeks a judicial declaration that it has not waived its sovereign immunity under the McCarran Amendment, 43 U.S.C. § 666, so as to vest the State of Oregon with jurisdiction to compel the United States to appear and submit claims for rights to water in the Klamath Basin Adjudication being conducted by the Water Resources Department of the State of Oregon. The United States seeks a permanent injunction prohibiting the State of Oregon from proceeding against the rights of the United States to water in the Klamath Basin in the proceedings before the Water Resources Department of the State of Oregon, or from otherwise affecting the rights of the United States to water in the Klamath Basin in any manner whatsoever.

The United States also seeks a declaration that it has not waived its sovereign immunity under the McCarran Amendment so as to vest the State of Oregon with jurisdiction to compel the United States to file registration statements of claims of "federal reserved" and "vested" rights to water in the State of Oregon outside of the

Klamath River Basin, and a permanent injunction prohibiting the State of Oregon from compelling the United States to file such registration statements or from otherwise affecting the rights of the United States to water in the State of Oregon through the requirement of filing "registration statements."

In its complaint in intervention, the Klamath Tribe (the Tribe) adopts the complaint of the United States and alleges two additional claims for relief: 1) to subject the water rights of the Tribe to quantification under the processes used by the State of Oregon is to deny the Tribe its right to an unbiased decision maker in violation of the Fifth and Fourteenth Amendments to the United States Constitution; and 2) to impose upon the Tribe the fees required by the State of Oregon in conjunction with the filing of claims for water rights is impermissible because federal law, including the Treaty of 1864 and federal common law, preempts the imposition of such fees on its federal rights.

UNDISPUTED FACTS

Since February 24, 1909, the Water Resources Department of the State of Oregon has issued permits and certificates for uses of water in the Klamath Basin. In 1975, the State of Oregon initiated the Klamath Basin Adjudication by sending notices to approximately 30,000 potential claimants of water rights. A claimant of water rights who was notified of the Klamath Basin Adjudication was also notified that the claimant must participate in the adjudication of water rights or the State of Oregon

would conclude that the claimant had abandoned its claim to water rights.

The Attorney General of the United States was served with notice of the Klamath Basin Adjudication on December 21, 1990. Approximately 220 claims to water rights have been submitted to the State of Oregon in the Klamath Basin Adjudication; 56 of the claims are the claims of allottees who are members of the Tribe, and the remaining 164 claims are non-federal and non-Indian claims.

The only claims that may be filed in the Klamath Basin Adjudication are those based on water usage initiated before February 24, 1909 and rights to water reserved by the federal government. The State of Oregon has threatened to treat the rights reserved by the federal government as forfeited if the United States fails to participate in the proceedings before the Water Resources Department of the State of Oregon in the Klamath Basin Adjudication. The Water Resources Department of the State of Oregon has in the past refused to file claims to water rights that were not accompanied by statutory filing fees. The Water Resources Department of the State of Oregon will refuse to accept claims filed by the federal government if these claims are not accompanied by the applicable filing fees.

The State of Oregon also seeks to compel the United States to file with the Water Resources Department of the State of Oregon "registration statements" of all "federal reserved" and "vested" claims to water throughout the State of Oregon except for the Klamath Basin.

[1] A treaty between the government of the United States and the Tribe reserves to the Tribe certain water rights, including agricultural water rights and streamflow water rights. Streamflow water rights are nonconsumptive rights to an amount of water in streams to support the resources required for the fishing, hunting, trapping and gathering activities allowed to the Tribe by treaty with the United States.

The quantification of water rights in the Klamath Basin that has been initiated by the State of Oregon includes areas where the federal government has granted water rights to the Tribe. The Water Resources Department of the State of Oregon has served notice on the Tribe that the Tribe must file its claims to these federally-granted water rights with the State of Oregon or these claims will be deemed forfeited by the State of Oregon.

CONTENTIONS OF THE PARTIES

The United States contends that it is entitled to summary judgment in its favor on all claims because:

1) the proceedings that the State of Oregon is employing to determine water rights are administrative and do not constitute a "suit" within the meaning of the McCarran Amendment; and

2) the Klamath Basin Adjudication being conducted by the State of Oregon is not "comprehensive" within the meaning of the McCarran Amendment because a) it does not include adjudication of water rights on other previously adjudicated tributaries of the Klamath River or afford the United States an opportunity to contest those

previously adjudicated rights; b) it does not include post-1909 water rights and does not afford the United States an opportunity to contest those rights; and c) it does not include adjudication of rights to groundwater; and

3) the State of Oregon cannot compel the United States to file registration statements covering all of the water rights that the United States claims in the State of Oregon because a) the scheme of filing registration statements is not a "suit" within the meaning of the McCarran Amendment; b) the scheme of filing registration statements is not a "comprehensive general adjudication" within the meaning of the McCarran Amendment; and c) there is no authority for the State of Oregon to require the United States to file registration statements; and

4) the State of Oregon cannot compel the United States to pay filing fees to cover the costs incurred by the State of Oregon in registering and adjudicating claims to water rights because a) the United States has not waived sovereign immunity with respect to such a requirement; b) the filing fee requirement is barred by the supremacy clause of the United States Constitution; c) the filing fee requirement is barred by the property clause of the United States Constitution; and d) the filing fee requirement is barred by 28 U.S.C. § 2408.

The Tribe contends that it is entitled to summary judgment on each of its claims for the reasons stated by the United States and for the following additional reasons:

1) to require the Tribe to submit to the adjudication procedures of the State of Oregon regarding water rights

would deprive the Tribe of its due process right to an impartial decision maker; and

2) the imposition of filing fees on the water rights of the Tribe, which rights were granted by treaty with the federal government, is preempted by federal law.

The State of Oregon contends that it is entitled to summary judgment in its favor on the claims of the United States and the Tribe because:

1) the stipulated consent decree entered in *United States v. Adair*, 478 F.Supp. 336 (D.Or.1979), bars the Tribe and the United States from obtaining a declaration that the process used by the State of Oregon to adjudicate the water rights of the United States and the Tribe does not meet the requirements of the McCarran Amendment for waiving the sovereign immunity of the United States; and

2) the procedure followed by the State of Oregon to adjudicate the water rights of the Tribe and the United States meets the requirements of the McCarran Amendment for waiving sovereign immunity of the United States because the Attorney General of the United States has been served with notice of the Klamath Basin Adjudication, and the Klamath Basin Adjudication is a "comprehensive" system that constitutes a "suit" for the purpose of determining water rights; and

3) the process of the State of Oregon in determining the water rights of the United States and the Tribe does not violate the due process clause of the fourteenth amendment because the water rights of the Tribe will not be adjudicated by decision makers who are biased; and

4) the United States and the Tribe are required to file the registration statements because the registration statements are part of the ultimate a idication of water rights under the laws of the State of Oregon; and

5) the United States and the tribe must pay the filing fees because the filing fees are not a "judgment for costs" so as to be prohibited by the McCarran Amendment and therefore are not preempted by other federal laws.

APPLICABLE STANDARD

Summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The initial burden is on the moving party to point out the absence of any genuine issue of material fact. Once the initial burden is satisfied, the burden shifts to the opponent to demonstrate through the production of probative evidence that there remains an issue of fact to be tried. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). On a motion for summary judgment, all reasonable doubt as to the existence of a genuine issue of fact should be resolved against the moving party. *Hector v. Wiens*, 533 F.2d 429, 432 (9th Cir.1976).

APPLICABLE LAW

1. *The McCarran Amendment*

43 U.S.C. § 666, the McCarran Amendment, provides, in part:

(a) Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amendable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

(b) Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

2. *The Determination of Water Rights in the State of Oregon*

[2] Under the laws of the State of Oregon, the principle upon which claims of rights to water are based is the doctrine of prior appropriation, which prioritizes claims of rights to water according to a simple rule: first in time, first in right. Under the doctrine of prior appropriation,

the first person to take control of an amount of water and put that water to a beneficial use has the legal right to use that amount of water for so long as the need continues.

In 1909, in recognition of the fact that public records were needed to authoritatively establish and administer claims of rights to water under the doctrine of prior appropriation, the Oregon legislature enacted a two-prong system for the establishment and administration of claims of rights to water. Under the two-prong system, water rights were created and/or established after 1909, the date of the enactment of the code, through an application/permit/certificate system administered by a state agency (currently the Water Resources Department), and water rights claimed and/or established before 1909 were adjudicated together by river system. *See generally* O.R.S. Ch. 536, 537, 539.

This system for the adjudication of rights to water was adopted to protect the rights of those whose claims to water were acquired before the enactment of a code, which were deemed vested rights but were not rights of record, and to permit the accurate forecasting of available water supplies. The system was designed to characterize the nature and the priority status of water rights obtained before 1909 so these rights could be integrated with the records that existed for water rights granted under the application/permit/certificate system implemented after 1909.

In order to adjudicate rights to water claimed before 1909, the State of Oregon selects an area that encompasses a stream or a tributary system. Within that area, all persons who claim rights to water prior to 1909 or who

claim federally reserved rights to water[1] are notified of the adjudication and are required to file their claims to water rights. O.R.S. 539.021, 539.040. Any person or entity who receives notice of the adjudication and who fails to file his or its claim to water rights is subject to having those rights forfeited. O.R.S. 539.210.

In order to file a claim for the purpose of participating in a water rights adjudication, a claimant must provide the Water Resources Department of the State of Oregon with evidence regarding 1) when use of the claimed water rights began; 2) the location and purpose of the water use and source; and 3) the diversion point of the water rights claimed. O.R.S. 539.040. The Water Resources department of the State of Oregon may thereafter ask the claimant to provide additional information. O.R.S. 539.070.

When the Water Resources Department of the State of Oregon receives evidence that it considers sufficient to demonstrate that a claimant has made a *prima facie* claim to water rights, the Water Resources Department of the State of Oregon sends out notice of a period of open inspection. O.R.S. 539.090. During the period of open inspection, all interested parties may inspect the claim to water rights that has been filed. *Id.* Following the period of open inspection, parties may contest the validity of the

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[1] In *Winters v. United States*, 207 U.S. 564, 28 S.Ct. 207, 52 L.Ed. 340 (1908), the United States Supreme Court created the doctrine of federal reserve water rights. This doctrine holds that when land is set aside from the public domain, enough water is implicitly reserved with the land to satisfy the primary purpose for which it was set aside. *Id.*

claim that has been filed. Challenges to a claim are resolved in a contested case hearing. The Director of the Water Resources Department of the State of Oregon incorporates the result of these contested case hearings, together with any uncontested claims that have been approved, in making an overall determination of the water rights within a system. O.R.S. 539.130.

The findings of fact, supporting evidence, and determination of the Director must be submitted to the Circuit Court of the State of Oregon for the county in which the system being adjudicated lies. O.R.S. 539.130(1). Any party to the adjudication may appear before the circuit court to establish its own claim or to attack the claims filed by others. All parties have the opportunity to object to the determination of the Water Resources Department of the State of Oregon and to present additional evidence to the court. O.R.S. 539.150(3). Following the appearances by interested parties, the circuit court issues a judgment affirming or modifying the determination of the Director of the Water Resources Department of the State of Oregon. O.R.S. 539.150(4). The judgment order is appealable. O.R.S. 539.150(4).

After the circuit court issues its final decree, the Water Resources Department of the State of Oregon issues water rights certificates. These certificates have the same legal effect as the certificates issued by the Water Resources Department of the State of Oregon through the application/permit/certificate system established for claims to water rights that came into existence after 1909 and set forth in O.R.S. 537.250, 539.140. The holder of the certificate is then entitled to the benefits of state regulation in favor of the claimed water right. The water rights

decreed as a result of the process of adjudication described above are combined with the record of rights decreed by the application/permit/certificate system to create an integrated record of all persons or entities who have water rights in a given system. O.R.S. 537.250, 539.200.

ANALYSIS AND RULING

Neither the Ninth Circuit nor the United States Supreme Court has determined whether the procedures followed by the State of Oregon to adjudicate water rights meet the requirements set forth in the McCarran Amendment, thereby permitting a conclusion that the United States has waived its sovereign immunity and the State of Oregon has jurisdiction to compel the United States to participate in those proceedings. Therefore, this court must make that determination. In so doing, the court must strike a balance between the rule of statutory construction that the sovereign immunity of the United States is not waived by implication but must be unequivocally expressed, *United States v. Mitchell*, 445 U.S. 535, 538, 100 S.Ct. 1349, 1351, 63 L.Ed.2d 607 (1980), and the policy underlying the McCarran Amendment, which was enacted "to deal with a general problem arising out of the limitations that federal sovereign immunity placed on the ability of the States to adjudicate water rights." *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 564, 103 S.Ct. 3201, 3212, 77 L.Ed.2d 837 (1983).

1. *Does the stipulated consent decree entered in United States v. Adair preclude the United States from prevailing in this case?*

The State of Oregon contends that the consent decree entered in *United States v. Adair*, 478 F.Supp. 336 (D.Or.1979) (*Adair I*), precludes the United States and the Tribe from asserting that the United States has not waived its sovereign immunity with respect to the procedures used by the State of Oregon for determining water rights.

In *Adair I*, the United States sought an adjudication in federal court of its rights to water in the Williamson River, a tributary located within the Klamath Basin. The United States and the State of Oregon agreed upon the language in a stipulated declaratory judgment and a supplemental declaratory judgment, which provides: "Subject to the continuing jurisdiction of this Court, quantification of the rights to the use of the waters of the Williamson River and its tributaries within the litigation area will be performed by the State of Oregon within its applicable procedures." Exhibit 2 to Defendants' Memorandum in Support of Motions for Summary Judgment (Declaratory Judgment), pp. 3-4.

The State of Oregon contends that because the procedures used to adjudicate water rights have not changed since 1979 when the United States agreed to the consent decree in *Adair I*, the United States cannot now challenge the adequacy of those proceedings.

The United States contends that the supplemental declaratory judgment signed by the parties in *Adair I*

contemplated that any adjudication by the State of Oregon of the rights of the federal government to water would have to meet the requirements of the McCarran Amendment. The United States contends that the consent decree in *Adair I* is not determinative of the issues in this case because 1) the Ninth Circuit in *United States v. Adair*, 723 F.2d 1394 (9th Cir.1983) (*Adair II*), declined to decide whether the procedure used by the State of Oregon to adjudicate water rights constituted a "suit" within the meaning of the McCarran Amendment, or whether the procedures used by the State of Oregon were sufficient to effect a waiver of the sovereign immunity of the United States under the McCarran Amendment, *Adair II*, 723 F.2d at 1405, n. 9; and 2) the federal officials who signed the consent decree in *Adair I* did not have the authority to waive the sovereign immunity of the United States and to consent to the exercise of jurisdiction by the State of Oregon over the United States.

[3, 4] No official of the executive branch of the United States has the authority to waive the sovereign immunity of the United States and thus confer jurisdiction where none otherwise exists. *Stanley v. Schwalby*, 162 U.S. 255, 269-70, 16 S.Ct. 754, 760-61, 40 L.Ed. 960 (1896). Only Congress can consent to the waiver of the sovereign immunity of the United States. *Id.* The consent decrees signed by officials of the executive branch of government in the *Adair I* litigation cannot act as a waiver of the sovereign immunity of the United States. Therefore, those consent decrees do not bar the United States and the Tribe from raising a challenge to the procedures used by the State of Oregon under the McCarran Amendment.

2. *Does the procedure employed by the Water Resources Department of the State of Oregon constitute a "suit" within the meaning of the McCarran Amendment?*

[5] The McCarran Amendment provides, in part: "Consent is hereby given to join the United States as a defendant in any suit . . . for the adjudication of rights to the use of water of a river system or other source." 43 U.S.C. § 666(a). The United States and the Tribe contend that the procedure used by the State of Oregon does not constitute a "suit" within the meaning of the McCarran Amendment. In support of this argument, the United States and the Tribe point to the consistent use of terms in the McCarran Amendment that are associated with court proceedings: "[s]ummons or other process," "party to such suit," and "court having jurisdiction." The United States and the Tribe contend that because under the laws of the State of Oregon, the notice of adjudication issues not from a court, but from the Water Resources Department of the State of Oregon, and because the first phase of the adjudicatory proceedings is conducted by the Director of the Water Resources Department of the State of Oregon, the entire process is not a "suit" within the meaning of the McCarran Amendment.

As outlined above, under the laws of the State of Oregon, the adjudication of water rights begins with a hearing before the Director of the Water Resources Department of the State of Oregon. Following this hearing, in which all interested parties may participate and submit evidence, the Director of the Water Resources Department of the State of Oregon makes proposed, written findings of fact and orders of determination regarding all of the water rights being adjudicated.

These proposed findings of fact and orders of determination as to water rights must be submitted to the Circuit Court of the State of Oregon for the county in which the river system whose water is being allocated is located. Upon receipt of the proposal of the Director of the Water Resources Department of the State of Oregon and the evidence upon which the proposal of the Director is based, the circuit court sets a hearing at which time it considers any exceptions filed to the adjudication. During the course of the hearing, the court may take additional evidence or order that additional evidence be gathered by the Director of the Water Resources Department of the State of Oregon or by a referee appointed for that purpose. It is only after the circuit court has conducted its hearing and reviewed the evidence submitted that it issues an order and a judgment affirming, modifying or denying the determination of the Director of the Water Resources Department of the State of Oregon. It is not until the judgment has been entered that the rights of the parties are fully adjudicated. A judgment entered by a circuit court judge is reviewable by the appellate courts of the State of Oregon.

The United States Supreme Court has reviewed the procedures followed by the Water Resources Department of the State of Oregon and the circuit courts in the process of adjudicating water rights in a case cited in the legislative history of the McCarran Amendment. *Pacific Live Stock Co. v. Lewis*, 241 U.S. 440, 451, 36 S.Ct. 637, 642 60 L.Ed. 1084 (1915). The court summarized the procedures as follows:

> They are not independent or unrelated, but parts of a single statutory proceeding, the earlier stages of which are before the [water] board and the later stages before the court. In notifying claimants, taking statements of claim, receiving evidence, and making an advisory report, the board merely paves the way for an adjudication by the court of all the rights involved. . . . That the state, consistently with due process of law, may thus commit the preliminary proceedings to the board and the final hearing and adjudication to the court, is not debatable.

Id. at 451-52, 36 S.Ct. at 642.

Furthermore, the United States Supreme Court "has warned against overly technical application of the McCarran Amendment." *Adair II*, 723 F.2d at 1405, n. 9. This court finds that the fact that certain preliminary procedures are undertaken by the Water Resources Department of the State of Oregon, incident to the adjudication of water rights in a court of general jurisdiction, does not support a conclusion that the procedures of the State of Oregon for adjudicating water rights do not constitute a "suit" within the meaning of the McCarran Amendment.

3. *Is the Klamath Basin Adjudication a comprehensive, general adjudication within the meaning of the McCarran Amendment?*

[6] The federal policy underlying the consent given by Congress to state jurisdiction provided for under the McCarran Amendment is the avoidance of piecemeal

adjudication of water rights. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 819, 96 S.Ct. 1236, 1247, 47 L.Ed.2d 483 (1976).

The United States and the Tribe argue that the Klamath Basin Adjudication is not a comprehensive general adjudication within the meaning of the McCarran Amendment because 1) it does not include the adjudication of claims to previously adjudicated tributaries to the Klamath River or allow the United States to contest those claims; 2) it does not include claims to post-1909 water rights or allow the United States to contest those claims; and 3) it does not include an adjudication of groundwater rights.

The United States and the Tribe rely on *Dugan v. Rank*, 372 U.S. 609, 617-19, 83 S.Ct. 999, 1004-06, 10 L.Ed.2d 15 (1963), in support of their contention that the waiver of sovereign immunity provided by the McCarran Amendment applies only to cases involving a "general" adjudication of all of the rights of various owners on a given stream. However, the facts upon which *Dugan* was decided differ significantly from the facts presented to the court in this case. *Dugan* involves a suit to determine the water rights solely between certain private individuals and the United States and the local Reclamation Bureau. In holding that waiver of sovereign immunity provided in the McCarran Amendment does not apply to such a suit, the United States Supreme Court stated that the suit did not involve the general adjudication of water rights envisioned by the McCarran Amendment because not all of the claimants to water rights along the river were parties to the suit; no relief was either asked for or granted between the claimants; and the suit was not one

which sought to establish priorities among claimants as to the appropriative and the prescriptive rights that they claimed.

The case before this court involves much more than a challenge by private individuals to the water rights claimed by the United States. The State of Oregon has taken steps to characterize and record the nature of the rights of all claimants to water along a river system and to establish the priorities and the appropriative and the prescriptive rights of these claimants. Thus, unlike the suit in *Dugan*, this case is the sort of general adjudication envisioned by the McCarran Amendment.

The United States and the Tribe next contend that the Klamath Basin adjudication is not comprehensive as required by the McCarran Amendment because it does not require all holders of water rights in the Klamath Basin to participate in the adjudication.

Under the laws of the State of Oregon, each holder of water rights in previously adjudicated areas of the Klamath Basin, as well as holders of water rights by virtue of a permit issued after 1909, is denominated a party to the Klamath Basin Adjudication. The holders of these water rights do not need to participate in the Klamath Basin Adjudication unless they wish to contest the claims that are being adjudicated. There is no statutory provision conferring a right upon claimants in the Klamath Basin Adjudication to contest the water rights determinations which have previously been made in the Klamath Basin or to contest water rights existing under permits issued after 1909.

In two cases, the United States Supreme Court addresses the issue of comprehensiveness as required by the McCarran Amendment. In *United States v. District Court, Eagle County, Colo.*, 401 U.S. 520, 525, 91 S.Ct. 998, 1002, 28 L.Ed.2d 278 (1971), the United States argued that a supplemental adjudication of water rights wherein "only those who claim water rights acquired since the last adjudication of that water district are before the court" was not the comprehensive sort of adjudication required by the McCarran Amendment. The United States was a party to the supplemental adjudication, but had not been a party to the prior proceedings. As in this case, the United States argued that because it was not a party to the prior adjudications and could not contest the claims asserted in those adjudications, it could not be barred by the previous decrees, and since the owners of previously decreed rights were not before the court in the supplemental adjudication, the requirements for consent to suit of the McCarran Amendment were not met.

The court disagreed with the "extremely technical" and "narrow" interpretation of the McCarran Amendment proposed by the United States, and held that the proceedings were comprehensive enough to support a finding that the United States had consented to the suit. The court held that "[t]he absence of owners of previously decreed rights may present problems going to the merits, in case there develops a collision between them and any reserved rights of the United States. All such questions, including the volume and scope of particular reserved rights, are federal questions which, if preserved,

can be reviewed here after final judgment by the Colorado court." *Eagle County*, 401 U.S. at 525-26, 91 S.Ct. at 1003.

In *United States v. District Court, Water Div. No. 5, Colo.*, 401 U.S. 527, 91 S.Ct. 1003, 28 L.Ed.2d 284 (1971), the United States was served with notice of a proceeding in the Colorado state court for the adjudication of water rights in the drainage basins of the Colorado River System. As in this case, the United States argued that the state statutory procedure, which contemplated monthly meetings before a referee of the State of Colorado regarding application for water rights did not constitute general adjudications of water rights for purposes of the McCarran Amendment because all of the water users and all of the water rights in a stream system were not implicated in the determinations of the referee. The only water rights considered in the proceeding were those for which applications had been filed within a particular month.

The United States Supreme Court held that the statutory procedure reached all claims, "perhaps month by month but inclusively in the totality," and thus was comprehensive within the meaning of the McCarran Amendment. *Water Div. No. 5*, 401 U.S. at 529, 91 S.Ct. at 1004.

In both of these cases, the Supreme Court held that the fact that some rights on a river system are adjudicated before other rights was immaterial to a decision of whether a statutory scheme was sufficiently comprehensive to find a consent to suit under the McCarran Amendment. The system of adjudicating water rights used by the State of Oregon results in the ultimate adjudication of all claims and a characterization of the priority of those

claims relative to one another, and is therefore comprehensive within the meaning of the McCarran Amendment. If the United States is dissatisfied with the outcome of this adjudication, it has resort to the appellate courts of the State of Oregon and the United States Supreme Court if its objections are properly preserved. *Eagle County*, 401 U.S. at 526, 91 S.Ct. at 1003.

Finally, the United States and the Tribe argue that because the adjudicative procedures of the State of Oregon do not call for simultaneous adjudications of rights to surface water and rights to groundwater within a given river system, the adjudication is not comprehensive within the meaning of the McCarran Amendment. The language of the McCarran Amendment does not support this construction, and the United States and the Tribe point to no provision in the legislative history and no case precedent, state or federal, in support of this construction of the McCarran Amendment.

4. *Does requiring the Tribe to submit to the adjudication procedures of the State of Oregon violate its due process right to an impartial decision maker?*

The Tribe contends that the role played by the Water Resources Department and the Department of Justice of the State of Oregon in the adjudication of water rights violates the right of the Tribe to due process of law by denying it an impartial decision maker. The Tribe recounts the need for federal protection of tribal rights from the existence of state-tribal tensions, *see Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. at 571, 103 S.Ct. at 3215, and points to litigation in the State of

Oregon concerning the existence of tribal hunting and fishing rights.

The Tribe argues that agents of the Department of Justice of the State of Oregon who have opposed the position of the Tribe in prior litigation involving tribal treaty rights are now in the position of adjudicating the Tribe's claims to water rights. The Tribe points out that a number of lawyers employed by the Department of Justice participated in briefing and advocating the position of the State of Oregon in earlier litigation in which the State of Oregon opposed certain rights to which the Tribe claimed entitlement. The Tribe contends that some of these lawyers are still active in the Department of Justice.

The Tribe contends that the statutory scheme of the State of Oregon, wherein the Department of Justice, at the direction of the Attorney General, who is an elected official, provides legal advice to the Director of the Water Resources Department, who is a political appointee of the Governor, who will quantify the water rights of the Tribe and submit findings and recommendations to a court, violates its right to have an impartial decision maker adjudicate its claims to water rights.

"[A] 'fair trial in a fair tribunal is a basic requirement of due process.' " *Withrow v. Larkin*, 421 U.S. 35, 46, 95 S.Ct. 1456, 1464, 43 L.Ed.2d 712 (1975), *quoting In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955). This tenet applies to administrative agencies which adjudicate, as well as to courts. *Id.* Not only is a biased decision maker constitutionally unacceptable, but our system of law has always endeavored to prevent even the probability of unfairness. *Id.*

Certain situations exist in which experience teaches that the probability of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerable. *Id.* Among these cases are those in which the adjudicator has a pecuniary interest in the outcome and in which he has been the target of personal abuse or criticism from the party before him. *Id.* This case presents neither of these situations.

[7] Absent the presence of a personal or financial stake in the outcome of the proceedings by the adjudicator, the test for determining a probability of unfairness has been articulated as one in which:

1) the presumption of honesty and integrity among administrative adjudicators is balanced against a realistic appraisal of psychological tendencies and human weaknesses where administrators have made prior judgments or commitment such that they would be so psychologically wedded to their previous positions that they would consciously or unconsciously avoid the appearance of having erred or changed position. *Withrow v. Larkin*, 421 U.S. at 55, 95 S.Ct. at 1468; and

2) whether "a disinterested observer may conclude that [the agency] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it." *Cinderella Career and Finishing Schools, Inc. v. FTC*, 425 F.2d 583, 591 (D.C.Cir.1970). Furthermore, to find a violation of procedural due process, it is the decision maker who must be biased; it is not sufficient to allege that other state officials not serving as the adjudicator may be biased. *Hammond v. Baldwin*, 866 F.2d 172 (6th Cir.1989).

[8] The individuals who represented the interests of the State of Oregon in earlier litigation were advocates who took a legal position on the laws they were charged with enforcing and applying. The Tribe has failed to produce any evidence in support of its contention that an official who adjudicates its claims to water rights has prejudged the facts as well as the law of that particular case, or failed to produce evidence sufficient for the court to find that any one of these officials would be so psychologically wedded to their previous positions that they would consciously or unconsciously avoid the appearance of having erred or changed positions.

5. *Can the State of Oregon compel the United States to file registration statements of all, except for the Klamath Basin, of the water rights that the United States claims in the State of Oregon?*

[9] Under O.R.S. 539.240(1), the State of Oregon seeks to compel the United States to file with the Water Resources Department of the State of Oregon, on or before December 31, 1992, registration statements for all claims of the federal government to water pursuant to reserved rights or vested rights throughout the State of Oregon except for the Klamath Basin. The State of Oregon argues that this registration filing requirement is part of the adjudication process and also an administration of water rights under the McCarran Amendment.

The McCarran Amendment only waives the sovereign immunity of the United States from suit in a comprehensive adjudication of water rights. The registration statements required under O.R.S. 539.240(1) predate the

inception of the adjudication process and create only "a written record of claims which might not actually be validated for years." Defendants' Memorandum in Support of Motion for Summary Judgment, p. 38. There is no suit under way in the State of Oregon to adjudicate the water rights of the United States outside of the Klamath Basin, and therefore the registration statements required under O.R.S. 539.240(1) cannot be justified under the McCarran Amendment.

The sovereign immunity of the United States is not waived by implication. *United States v. Mitchell,* 445 U.S. at 538, 100 S.Ct. at 1351. The McCarran Amendment cannot be read as a waiver of sovereign immunity for the administration of unadjudicated water rights. *South Delta Water Agency v. United States Dep't of Interior,* 767 F.2d 531, 541 (9th Cir.1985). The McCarran Amendment does not waive the sovereign immunity of the United States so as to allow the State of Oregon to require the United States to file registration statements for unadjudicated claims or forfeit those claims.

6. *Is the United States required to comply with the law of the State of Oregon which requires the payment of filing fees in conjunction with the adjudication of water rights?*

[10] Pursuant to O.R.S. 539.081, the State of Oregon charges fees to those individuals claiming water rights in connection with the adjudication of those rights. O.R.S. 539.081(4) provides:

> All fees paid under this section shall be deposited into the General Fund of the State Treasury and credited to an account of the Water

> Resources Department. The fees shall be used to pay for the expenses of the department to:
>
> (a) Register claims to undetermined vested rights or federal reserved rights under ORS 539.230 and 539.240; and
>
> (b) Determine claims registered under ORS 539.230 and 539.240.

The United States contends that under the McCarran Amendment, it is not required to pay these filing fees.

The McCarran Amendment provides, in part: "The United States, when a party to any such suit [a water rights adjudication], shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty." 43 U.S.C. § 666(a). The McCarran Amendment also provides that no judgment for costs is to be entered against the United States in a suit to adjudicate water rights. *Id.*

Federal law specifies that a judgment for costs is taxed against the losing party and is "limited to reimbursing in whole or in part the prevailing party for the costs incurred by such party in the litigation." 28 U.S.C. § 2412(a). The filing fees set forth in O.R.S. 539.081 do not fall within this definition because they are required even where there is no prevailing party, ie., even where a claim goes unchallenged.

The Colorado Supreme Court considered this issue in *United States v. City and County of Denver,* 656 P.2d 1 (Colo.1982), and ruled that the prohibition of the McCarran Amendment against judgments for costs did not excuse the United States from paying a filing fee. This

decision was cited and followed by the District Court of the Fifth Judicial District of the State of Idaho, which reasoned: "Nine years has passed since the Colorado Supreme Court ruled against the United States on this issue and Congress has yet to express a different intent. If Congress intended a broader exemption, it would, could, and still can, amend the McCarran Amendment and exempt the United States from paying filing fees." *Idaho v. United States*, Case No. 39576, Exhibit 2 to Defendants' Memorandum in Response to Plaintiff's Motions for Summary Judgment (Memorandum Decision), p. 13.

The plain language of the McCarran Amendment is that when the United States is party to a suit for the adjudication of water rights, the United States shall be deemed to have waived any right to plead that the state laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty. The filing fees required by O.R.S. 539.081 are not judgments for costs. Therefore, the United States is bound to pay the filing fees associated with the adjudication of its water rights.

7. *Is the Tribe required to comply with the law of the State of Oregon which requires the payment of filing fees in conjunction with the adjudication of water rights?*

[11] The State of Oregon has exempted for the fee requirements of O.R.S. 539.081 claims by any federally recognized Indian tribe and the United States, acting as trustee for such a tribe. O.R.S. 539.081(2). However, this exemption applies only to federal or tribal claims for

vested rights to the use of surface water for any nonconsumptive and nondiverted instream use to satisfy tribal hunting, fishing or gathering rights. The Tribe has claims that do not fall within the exemption, including claims for consumptive and diversionary uses, such as agriculture. *Adair II*, 723 F.2d at 1410.

[12] The State of Oregon contends that it derives authority to charge a filing fee from the Tribe from the McCarran Amendment. However, the McCarran Amendment neither implicitly nor explicitly refers to tribal rights. While the power to abrogate treaty rights exists, the intention to abrogate or modify them is not to be lightly imputed to Congress. *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 88 S.Ct. 1705, 20 L.Ed.2d 697 (1968).

The United States Supreme Court considered a set of facts analogous to those presented by this case in *Tulee v. Washington*, 315 U.S. 681, 62 S.Ct. 862, 86 L.Ed. 1115 (1942). In *Tulee*, an Indian challenged the imposition of a state license fee for fishing on the grounds that the fee was repugnant to a right reserved to him by treaty to take fish. The Supreme Court ruled in favor of the Indian, finding that the license fee, which was ostensibly regulatory but also revenue generating, acted "upon the Indians as a charge for exercising the very right their ancestors intended to reserve." *Id.* at 685, 62 S.Ct. at 865.

In the Treaty of 1864, the Tribe reserved to itself certain subsistence rights, including the right to fish, hunt and gather, and agreed to begin a way of life more dependent on agriculture. Pursuant to the Treaty, the Tribe reserved sufficient water for all of these purposes.

Adair II, 723 F.2d at 1410. Under the reasoning of the United States Supreme Court in *Tulee*, to require the Tribe to pay filing fees would be to charge it for exercising rights which it reserved unto itself, and would therefore violate the Treaty of 1864 and federal law. The Tribe cannot be compelled to pay filing fees in conjunction with the adjudication of its water rights.

CONCLUSION

The motion for summary judgment of the United States (# 52) is granted as to its fourth claim for relief (registration statements) and is otherwise denied.

The motion for summary judgment of the Tribe (# 55) is granted as to its second claim for relief (preemption of state imposition of fees on treaty rights) and is otherwise denied.

The motion for summary judgment of defendants (# 54) is denied as to the fourth claim for relief of the United States and the second claim for relief of the Tribe and is otherwise granted.

180.060 Powers and duties of Attorney General. (1) The Attorney General shall:

(a) Appear for the state in the trial of all civil and criminal causes in the Supreme Court or the Court of Appeals in which the state may be directly or indirectly interested.

(b) Appear for the state, when required by the Governor or the legislature, in any court or tribunal in any cause in which the state is a party or in which the state is directly interested.

(c) Appear, commence, prosecute or defend for the state all causes or proceedings in the Supreme Court or the Court of Appeals in which the state is a party or interested.

(d) Appear, commence, prosecute or defend any action, suit, matter, cause or proceeding in any court when requested by any state officer, board or commission when, in the discretion of the Attorney General, the same may be necessary or advisable to protect the interests of the state.

(2) The Attorney General shall give opinion in writing, when requested, upon any question of law in which the State of Oregon or any public subdivision thereof may have an interest, submitted to the Attorney General by the Governor, any officer, department, agency, board or commission of the state or any member of the legislature.

(3) The Attorney General shall not render opinions or give legal advice to others than such state officers listed in subsection (2) of this section.

(4) The Attorney General shall consult with, advise and direct the district attorneys in all criminal causes and matters relating to state affairs in their respective counties. The Attorney General may require their aid and assistance in all matters pertaining to the duties of the Attorney General in their respective counties and may, in any case brought to the Supreme Court or the Court of Appeals from their respective counties, demand and receive assistance of the district attorney from whose county such case or matter is brought.

(5) The Attorney General shall, when requested, perform all legal services for the state or any department or officer of the state.

(6) The Attorney General shall have all the power and authority usually appertaining to such office and shall perform the duties otherwise required of the Attorney General by law.

(7) The Attorney General shall assign to each agency, department, board or commission an assistant who shall be its counsel responsible for insuring the performance of the legal services requested by such agency, department, board or commission. The counsel shall be a person trained in the law concerning such agency, department, board or commission and shall be approved by the chief administrator thereof, provided, however, such approval shall not be unreasonably withheld. Such approval may be withdrawn at any time by the chief administrator and thereupon the Attorney General shall assign replacement counsel to the agency, department, board or commission.

(8) The Attorney General shall not appear on behalf of any officer, department, agency, board or commission without its consent in any action, suit, matter, cause or proceeding in any court or before any other federal or state regulatory body.

(9) The responsibility of establishing policies for each agency, department, board or commission shall rest upon the chief administrator thereof.

537.620 Acceptance and approval of applications.

* * *

(3) When an application discloses the probability of wasteful use or undue interference with existing wells or that any proposed use or well will impair or substantially interfere with existing rights to appropriate surface water by others, or that any proposed use or well will impair or substantially interfere with existing rights to appropriate ground water for the beneficial use of the water for its thermal characteristics, the commission may impose conditions or limitations in the permit to prevent the same or reject the same after hearing, or, in the commission's discretion, initiate a rulemaking proceeding to declare the affected area a critical ground water area under ORS 537.730 to 537.740.

* * *

537.670 Determination of rights to appropriate ground water of ground water reservoir. (1) The Water Resources Director upon the motion of the director or, in the discretion of the director, upon the receipt of a petition therefor by any one or more appropriators of ground water from such ground water reservoir, may proceed to make a final determination of the rights to appropriate the ground water of any ground water reservoir in this state.

(2) The director shall prepare a notice of intent to begin a determination referred to in subsection (1) of this section. The notice shall set forth a place and time when the director or the authorized assistant of the director shall begin the taking of testimony as to the rights of the various claimants to appropriate the ground water of the ground water reservoir and as to the boundaries and depth thereof. A copy of the notice shall be delivered to each person or public agency known to the director from an examination of the records in the Water Resources Department to be a claimant to a right to appropriate ground water of the ground water reservoir or any surface water within the area in which the ground water reservoir is located. The notice shall also be published in at least one issue each week for at least two consecutive weeks in a newspaper of general circulation published in each county in which the ground water reservoir or any part thereof is located. If the ground water reservoir is located in whole or in part within the limits of any city, the notice shall be published in at least one issue each week for at least two consecutive weeks in a newspaper of general circulation published in the city, if any, and copies of the notice shall be delivered to the mayor or

chairman of the governing body of the city. Copies of the notice shall be delivered and the last publication date of published notices shall be at least 30 days prior to the taking of any testimony.

(3) The director shall enclose with each copy of the notice referred to in subsection (2) of this section delivered to each person or public agency known to be a claimant to a right to appropriate ground water of the ground water reservoir a blank form on which such claimant shall present in writing all the particulars necessary for determination of the right of the claimant as may be prescribed by the director. The director may require each claimant to certify to the statements of the claimant under oath, and the director or the authorized assistant of the director may administer such oaths.

537.735 Rules designating critical ground water area. (1) A rule adopted by the Water Resources Commission under ORS 537.730 shall:

(a) Define the boundaries of the critical ground water area and shall indicate which of the ground water reservoirs located either in whole or in part within the area in question are included within the critical ground water area. Any number of ground water reservoirs which either wholly or partially overlie one another may be included within the same critical ground water area.

(b) Contain a provision requiring a periodic review of conditions in the critical ground water area. The review shall be in sufficient detail to evaluate the continuing need for the critical ground water area designation and shall occur no less frequently than once every 10 years.

(2) In adopting the rule, the commission shall consider any orders or permits applicable to the reservoir issued by the governing board or State Geologist of the State Department of Geology and Mineral Industries under ORS chapter 522.

(3) A rule by the commission under subsection (1) of this section may include any one or more of the following corrective control provisions:

(a) A provision closing the critical ground water area to any further appropriation of ground water, in which event the commission shall thereafter refuse to accept any application for a permit to appropriate ground water located within such critical area.

(b) A provision determining the permissible total withdrawal of ground water in the critical area each day, month or year.

(c) The disposition of any application for a water right permit for the use of water in the area that is pending at the time the commission initiates the rulemaking process or that is received during the rulemaking process.

(d) Any one or more provisions making such additional requirements as are necessary to protect the public welfare, health and safety in accordance with the intent,

purposes and requirements of ORS 537.505 to 537.795 and 537.992.

(e) A provision closing all or part of the critical ground water area to further appropriation of ground water for its thermal characteristics.

(f) A provision determining the permissible change in thermal characteristics of ground water in all or part of the critical ground water area each day, month or year. Insofar as may be reasonably done, the director shall apportion the permissible total temperature impact among those appropriators whose exercise of valid rights in the critical area affect the thermal characteristics of the ground water, in accordance with the relative dates of priority of such rights.

539.130 Findings of fact and determination of director; certification of proceedings; filing in court; fixing time for hearing by court; notice; force of director's determination.

* * *

(4) The determination of the department shall be in full force and effect from the date of its entry in the records of the department, unless and until its operation shall be stayed by a stay bond as provided by ORS 539.180.

539.150 Court proceedings to review determination of director. (1) From and after the filing of the evidence and order of determination in the circuit court, the proceedings shall be like those in an action not triable by right to a jury, except that any proceedings, including the entry of a judgment, may be had in vacation with the same force and effect as in term time. At any time prior to the hearing provided for in ORS 539.130, any party or parties jointly interested may file exceptions in writing to the findings and order of determination, or any part thereof, which exceptions shall state with reasonable certainty the grounds and shall specify the particular paragraphs or parts of the findings and order excepted to.

(2) A copy of the exceptions, verified by the exceptor or certified to by the attorney for the exceptor, shall be served upon each claimant who was an adverse party to any contest wherein the exceptor was a party in the proceedings, prior to the hearing. Service shall be made by the exceptor or the attorney for the exceptor upon each such adverse party in person, or upon the attorney if the adverse party has appeared by attorney, or upon the agent of the adverse party. If the adverse party is a nonresident of the county or state, the service may be made by mailing a copy to that party by registered mail or by certified mail with return receipt, addressed to the place of residence of that party, as set forth in the proof filed in the proceedings.

(3) If no exceptions are filed the court shall, on the day set for the hearing, enter a judgment affirming the determination of the Water Resources Director. If exceptions are filed, upon the day set for the hearing the court shall fix a time, not less than 30 days thereafter, unless for

good cause shown the time be extended by the court, when a hearing will be had upon the exceptions. All parties may be heard upon the consideration of the exceptions, and the director may appear on behalf of the state, either in person or by the Attorney General. The court may, if necessary, remand the case for further testimony, to be taken by the director or by a referee appointed by the court for that purpose. Upon completion of the testimony and its report to the director, the director may be required to make a further determination.

(4) After final hearing the court shall entered a judgment affirming or modifying the order of the director as the court considers proper, and may assess such costs as it may consider just except that a judgment for costs may not be rendered against the United States. An appeal may be taken to the Court of Appeals from the judgment in the same manner and with the same effect as in other cases in equity, except that notice of appeal must be served and filed within 60 days from the entry of the judgment.

Ground Water Controls

690-09-050 (1) The Department shall review existing ground water appropriations to determine the potential to cause substantial interference with a surface water source on a case-by-case basis, in accordance with OAR 690-09-040, whenever substantial interference with a surface water source is suspected to exist by the Department.

(2) Whenever the Department determines that substantial interference with a surface water supply exists, the Department shall control those groundwater appropriations that have been determined under section (1) of this rule to have the potential to cause substantial interference. The controls shall be similar to or compatible with, buy [sic] not more restrictive than controls on the affected surface water source, in accordance with the relative dates of priorities of the ground water and surface water appropriations:

(a) Prior to controlling the use of any well greater than 500 feet from a surface water source, the Department shall determine whether any control would provide relief to the surface water supply in an effective and timely manner. The Department shall make the determination on the basis of the best available information, employing at least one of the methods set forth in OAR 690-09-040(4)(d);

(b) The Department shall control the use of wells greater than one mile from a surface water source only through a critical ground water area determination in accordance with ORS 537.730 through 537.740.

APPENDIX D
SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

Coordination Proceeding Special Title (Rule 1550(b))	JUDICIAL COUNCIL COORDINATION PROCEEDING NO. 2565
PUTAH CREEK WATER CASES	
Coordinated Actions:	SOLANO SUPERIOR COURT NO. 108552
Putah Creek Council v. Solano Irrigation District	SACRAMENTO SUPERIOR COURT NO. 515766
Solano Irrigation District v. All Appropriative Water Rights Holders in Upper Basin	RULING RE MOTION TO DISMISS

The United States has moved for its dismissal as a defendant from the proceedings initiated by plaintiffs and by cross-complainants, the City of Davis, the Regents of the University of California, and certain landowners collectively represented by McCutchen, Doyle, Brown & Enerson. The United States contends that these proceedings do not encompass an adjudication of water rights which is sufficiently comprehensive to waive its sovereign immunity from suit under the McCarran Amendment. According to the United States, the proceedings

seek to adjudicate rights to the surface waters of Putah Creek without adjudicating rights to the surface and groundwaters of the Sacramento River system that are hydrologically connected to Putah Creek.

In ruling on the United States' motion, the Court notes that California statutes do not authorize a motion to dismiss as a means of challenging the sufficiency of pleadings and, in the exercise of its inherent authority, treats the motion to dismiss as a general demurrer. (See *McKay v. County of Riverside* (1959) 175 Cal.App.2d 247, 249.) The Court considers whether, from the face of the first amended complaint and cross-complaints and from matter judicially noticed by the Court, it appears that the adjudication of water rights sought in these proceedings is not sufficiently comprehensive to waive the sovereign immunity of the United States pursuant to the McCarran Amendment and provide the Court with jurisdiction to adjudicate the United States' rights.

The McCarran Amendment, set forth in section 666 of title 42 of the United States Code, consents to the joinder of the United States as a defendant "in any suit for the adjudication of rights to the use of water of a river system or other source." Congress enacted the amendment to allow the adjudication in one judicial proceeding of all rights to a given source of water, including those of the United States. (Senate Rep. No. 755, 82d Cong., 1st Sess., pp. 2, 4-5, 9 (1951), cited in *Colorado River Water Cons. Dist. v. U.S.* (1976) 424 U.S. 800, 808, 810-811. See *U.S. v. District Court for Water Div. No. 5* (1971) 401 U.S. 527, 529; *U.S. v. District Court for Eagle County* (1970) 520, 524; *Dugan v. Rank* (1963) 372 U.S. 609, 618.) By thus consenting to the joinder of the United States in a comprehensive

adjudication, Congress intended to minimize the potential for conflicts between the rights adjudicated and those omitted from the adjudication; avoid additional "piecemeal" suits to resolve such conflicts; and achieve a certainty and fairness with respect to water rights that was not feasible when the adjudication of rights was partial and contingent on unadjudicated rights. (*Ibid.*)

Because neither the language nor legislative history of the McCarran Amendment expressly delineates the scope of a water rights adjudication in which the United States may be joined as a defendant, courts have defined the scope by focusing on the congressional purpose of the amendment. To avoid piecemeal litigation over the conflicting water interests of parties using water from the same source, courts have found consent by the United States only to a suit which comprehensively adjudicates "all of the rights of the various owners on a given stream" (see *Dugan v. Rank, supra,* 372 U.S. at p. 618), either simultaneously or in stages that ultimately reach all claims "inclusively in the totality." (*U.S. v. District Court for Water Div. No. 5, supra,* 401 U.S. at p. 529; *United States v. Bluewater-Toltec Irr. Dist.* (D.N.M. 1984) 580 F.Supp. 1434, 1438; *In re Snake River Basin Water System* (Idaho Sup. 1988) 764 P.2d 78, 83-86.) This Court uses these judicial guidelines based on the purpose of the McCarran Amendment to determine whether the instant proceedings must adjudicate all interests in the surface and ground waters of Putah Creek and the Sacramento River to constitute a sufficiently comprehensive adjudication for joinder of the United States as a defendant.

Neither the allegations of the first amended complaint and cross-complaints nor any matter judicially

noticed by the Court indicates any significant connection between the waters of Putah Creek and the Sacramento River or any rights to the water of Putah Creek which compete and conflict with rights to the water of Sacramento River. Thus, the pleadings provide no basis for concern that the adjudication of rights to the water of Putah Creek, independent of rights to the water of the Sacramento River, could result in conflicts requiring resolution through additional piecemeal litigation. The Court concludes that Putah Creek is "a river system or other source" for purposes of a water rights adjudication in which the United States may be joined pursuant to the McCarran Amendment. (See *U.S. v. District Court for Eagle County, supra,* 401 U.S. at p. 520; cf. *In re Snake River Basin Water System, supra,* 764 P.2d at pp. 85-86.)

In contrast, the allegations of the complaint and cross-complaints and matter judicially noticed by the Court indicate a distinct relationship between the surface and groundwaters of Putah Creek and the potential for conflict between surface and groundwater rights. All of the pleadings reference Decision 869 of the State Water Resources Control Board which, in permitting the United States to appropriate water from Putah Creek for the Solano Project, sought to preserve existing prior downstream rights to the surface and groundwaters of Putah Creek. In the decision and subsequent orders amending the decision, the board conditioned the United States' permits on the release from project dams of sufficient water to satisfy prior downstream rights to divert surface water and to maintain groundwater percolated from the creek channel and pumped by downstream users. This condition in the board's decision and amending orders

was premised on the existence of a hydrological connection between Putah Creek surface flows and groundwater and on potential competition and conflict between the right to appropriate water for the Solano Project and prior rights to divert surface water and pump groundwater recharged by percolation from Putah Creek flows.

Reflecting these premises of Decision 869, the cross-complaint filed by McCutchen, Doyle, Brown & Enerson on behalf of certain landowners seeks to protect the prior rights of the landowners to Putah Creek surface *and* groundwater from impairment by plaintiffs' appropriation of water in the course of operating the Solano Project. The cross-complaint filed by the Regents similarly seeks to protect the prior rights of the university to Putah Creek surface *and* groundwater from plaintiffs' appropriation. The cross-complaint filed by the City of Davis alleges the city's interest in the litigation as that of a riparian landowner, a proponent of state programs for the protection of riparian habitat, *and* a municipality whose water supply derives solely from wells pumping water from aquifers recharged in part by Putah Creek flows. And, although the first amended complaint excludes groundwater interests from these proceedings on the basis of an expert opinion that groundwater pumpers would have a "*de minimus* [sic] effect" on the availability of instream water, plaintiffs inconsistently based their petition for coordination on a sworn statement that rights to Putah Creek ground and surface waters were inextricably intertwined.

Given the competing interests in Putah Creek surface and groundwaters apparent from the pleadings, the omission of groundwater interests from the instant proceedings can be expected to generate litigation in the future to resolve conflicts between adjudicated surface water rights and unadjudicated groundwater rights. This potential for future piecemeal adjudication of rights to Putah Creek waters establishes that these proceedings are not sufficiently comprehensive to constitute an adjudication of water rights in which the United States may be joined pursuant to the McCarran Amendment. Absent the inclusion of groundwater interests, the Court concludes that it lacks jurisdiction to adjudicate the rights of the United States in the proceedings.

A contrary result is not required by the decision in *U.S. v. State of Or. Water Resources Dept.* (D.Or. 1991) 774 F.Supp. 1568, 1578, that a water rights adjudication may be comprehensive within the meaning of the McCarran Amendment even though surface and groundwater within a given river system are not simultaneously adjudicated. That decision, in contrast to the pleadings here, reflects no connection and competition between ground and surface waters and no potential for subsequent piecemeal litigation to resolve conflicts between adjudicated surface rights and unadjudicated groundwater rights. (Compare *Cappaert v. United States* (1976) 426 U.S. 128, 142 (evidence showed interrelationship of groundwater and surface water).)

Nor is a contrary result dictated by the procedure under California law for adjudicating surface water rights independently of groundwater rights. (See Water Code section 2500 et seq.) The congressional purpose of the

McCarran Amendment to avoid piecemeal adjudication of conflicting rights to water in a given stream, not state statutory procedures for water rights adjudications, determines whether an adjudication is sufficiently comprehensive to join the United States as a defendant pursuant to the amendment. (See *U.S. v. State of Or. Water Resources Dept., supra,* 774 F.Supp. at pp. 1574, 1576, citing *Arizona v. San Carlos Apache Tribe of Arizona* (1983) 463 U.S. 545, 564, and *Colorado River Water Cons. Dist. v. U.S., supra,* 424 U.S. at p. 819.)

The Court, in reaching the conclusion that it lacks jurisdiction to adjudicate the rights of the United States in these proceedings, recognizes that the proceedings will have limited practical value unless the United States is a party. Any adjudication of Putah Creek water rights resulting from the proceedings will not be enforceable against the United States, the owner of the Solano Project and the holder of permits to appropriate water for the project from Putah Creek. Absent the inclusion of groundwater rights in the proceedings, however, the proceedings do not constitute an adjudication in which the United States may be joined. Therefore, the United States' motion for its dismissal from the complaint and cross-complaints, treated as a general demurrer, is sustained on the ground that the Court lacks jurisdiction. Plaintiffs and

cross-complainants are granted leave to amend within 20 days.

DATED: NOV 20 1992

[seal]

/s/ Jack Sapunor
JUDGE OF THE
SUPERIOR COURT

JACK V. SAPUNOR